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In The

Supreme Court of the United States

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October Term, 1997

IN RE:

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; SALES PRACTICES LITIGATION; ALL AGENTS' ACTIONS,

MICHAEL R. WEAVER, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When two parties enter into an agreement, does the agreement determine when issues or claims will be arbitrated or does a presumption in favor of arbitration overrule an agreement to exclude certain types of claims from arbitration?

II. When the Plaintiffs cannot recover on their claims without proving the alleged illegal nature of a company's insurance practices, does the "insurance business" exception found in the National Association of Securities Dealers (NASD) Code of Arbitration Procedure preclude arbitration of the Plaintiffs' employment disputes?

LIST OF ALL PARTIES

Rick A. Martin, Plaintiff/Petitioner

Michael Weaver, Plaintiff/Petitioner

Eugene Kroll, Plaintiff/Petitioner; case filed April 10, 1996

Carol Hales, Plaintiff/Petitioner; case filed April 30, 1996

Anthony Ybarra, Plaintiff/Petitioner; case filed May 7, 1996

Lori Anderson, Plaintiff/Petitioner; case filed September 11, 1996

Rebecca Montero, Plaintiff/Petitioner; case filed September 11, 1996

Wilmer Sigwarth, Plaintiff/Petitioner; case filed September 11, 1996

Steven Demarais, Plaintiff/Petitioner; case filed October 18, 1996

Theodore Willenbring, Plaintiff/Petitioner; case filed October 18, 1996

Darrell Dunn, Plaintiff/Petitioner; case filed October 30, 1996

Greg Knutson, Plaintiff/Petitioner; case filed case filed October 30, 1996

Donald Hales, Plaintiff/Petitioner; case filed March 27, 1997

Earl Schulenburg, Plaintiff/Petitioner; case filed case filed March 27, 1997

Anthony Bodway, Plaintiff/Petitioner; case filed January 30, 1998; and

G. Annette Nantz, Plaintiff/Petitioner;

The Prudential Insurance Company of America, Defendant/Respondent.

In addition to the parties named in the caption, the Court should be aware that a number of former agents of the Prudential Insurance Company of America from various states including Minnesota, Illinois and Kentucky had their cases consolidated pursuant to the rules pertaining to multi-district litigation. These actions were all consolidated in the United States District Court for the District of New Jersey. The Court's ruling on this case will affect all of the former agents' cases consolidated before the United States District Court for the District of New Jersey.

Over the years, Prudential has advertised and laid claim to being the largest insurance company in the United States. Because of the immense scope of Prudential it is extremely important that the United States Supreme Court address the issues presented by this Petition for Writ of Certiorari. Moreover, not only are the employees, agents and representatives of The Prudential Insurance Company of America affected by the outcome of this case, so too are thousands of employees, agents and representatives of other insurance companies doing business in the United States. If the decision of the United States Court of Appeals for the Third Circuit is allowed to stand, whistleblowers who allege that their employer is involved in the illegal sale of insurance products will be prevented from proceeding to a jury trial, and instead must face the bias of an NASD arbitration panel. *See Rosenbergh v. Merrill Lynch*, 76 FEP 681 (Mass. 1998).

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit, by a 2-1 margin, reversed the decision of the United States District Court for the District of New Jersey and filed an opinion and entered an order on January 7, 1998. Subsequently, Petitioners filed a Request for Rehearing or Rehearing In Banc on January 20, 1998. The United States Court of Appeals for the Third Circuit denied Petitioners' Request for Rehearing or Rehearing In Banc on February 24, 1998.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The NASD Code of Arbitration at Section 1 states:

> This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a) (3) of the by-laws of the National Association of Securities Dealers, Inc. (The Association) for the arbitration of any dispute, claim, or controversy arising out of or in connection with the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company.

> (1) between or among members;
>
> (2) between or among members and associated persons;
>
> (3) between or among members or associated persons and public customers, or others; and
>
> (4) between or among members, registered clearing agencies with which the [NASD] has entered.

NASD Code of Arbitration § 1. The NASD Form U-4 signed by the Petitioners States at p. 4, ¶5:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, Constitutions or by-laws of the organizations with which I register, as may be amended from time to time.

NASD Form U-4, p. 4, ¶5.

FACTS MATERIAL TO QUESTIONS PRESENTED

Petitioners Rick Martin, Kenneth Young Michael Weaver, Eugene Kroll, Carol Hales, Anthony Ybarra, Lori Anderson, Rebecca Montero, Wilmer Sigwarth, Steven Demarais, Theodore Willenbring, Darrell Dunn, Greg Knutson, Donald Hales, Earl Schulenburg and Anthony Bodway are former Prudential employees who allege that they were damaged by Prudential's fraudulent and deceptive insurance sales practices when Prudential adversely affected the terms and conditions of their

employment and ultimately discharged them for refusing to participate in the fraudulent and deceptive insurance sales practices being perpetrated by the company. Some of these agents allege that they whistleblew on fraudulent and deceptive insurance sales practices and were retaliated against by Prudential causing them damage. Others allege they suffered damages as a result of Prudential's organized and pervasive system of fraudulent and deceptive insurance sales practices in violation of RICO and other fraud. All these claims are intrinsic to and deeply enmeshed in Prudential's business of insurance.

When hired, Prudential employees were required to execute a Uniform Application Securities Industry Registration or Transfer ("Form U-4") which incorporated the arbitration provisions of The National Association of Securities Dealers ("NASD") Code of Arbitration Procedure (Code) as amended or modified. In many, if not all cases, Prudential required the agents as a condition of their continued employment to sign a new or updated U-4 on an annual basis, thus creating a new contract each time a new or updated U-4 was signed.

Prior to 1993, the NASD Code provided:

> This Code . . . is prescribed . . . for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company

In 1993, the NASD Code was amended to include employment disputes. The NASD amended the Code to read:

> This Code . . . is prescribed . . . for the arbitration of any dispute, claim or controversy arising out of

> or in connection with the business of any member of the Association *or arising out of the employment or termination of employment of associated person(s) with any member,* with the exception of disputes involving the insurance business of any member which is also an insurance company .

Note that the amendment for employment disputes was placed directly in front of the language stating, **"with the exception of disputes involving the insurance business of any member which is also an insurance company"** rather than after the "insurance business" exception. The NASD could have placed the "employment disputes" amendment after the "insurance business" exception if the NASD did not wish the exception to apply to employment claims where the business of insurance is involved. In its current form, the Code is quite clear, employment disputes are arbitrable except when they involve the insurance business of a company like the Respondent. All of the agents in the instant case, with the exception of Greg Knutson, were employees of Prudential at the time of the 1993 amendment to the NASD Code of Arbitration. Consequently, the new NASD rules apply to them and they should not be subject to arbitration because of the "business of insurance" exception. Moreover, even in Knutson's case, the insurance business exception existed, it simply was not as clearly applied to employment disputes involving the business of insurance as it was after the 1993 amendment. Accordingly, even Knutson's case should not be subject to arbitration. It is significant to note that since Prudential terminated its association with the NASD in May of 1996, Petitioners Kroll, Carol Hales, Ybarra, Willenbring and/or Schulenburg should not be compelled to arbitrate because they signed U-4 applications after May of 1996.

In this case, Respondent Prudential moved to compel arbitration of Petitioners' employment disputes involving their

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allegations that Prudential discharged and otherwise damaged them by its fraud for refusing to participate in the company's insurance sales fraud scheme. As the majority notes in the Opinion "[t]he Plaintiffs cannot recover under their various theories of liability without necessarily implicating the illegal nature of Prudential's insurance practices." *Majority Opinion*, at 12. Because the Petitioners cannot recover without implicating the illegal nature of Respondent's insurance practices, it is plain that the Petitioners' claims, even though employment-type disputes, are disputes involving the insurance business of Prudential. *Majority Opinion*, at 12. For this reason, the Honorable Alfred Wolin of the United States District Court for the District of New Jersey held that the Petitioners were not required to arbitrate their claims because the claims were within the business of insurance exception in the NASD Code. The United States Court of Appeals for the Third Circuit reversed because, as the majority stated, "it is not clear whether the business of insurance exception applies to employment related disputes, to disputes in connection with a member's business, or to both." *Majority Opinion*, at 13. However, the NASD Code was amended in 1993, to specifically **exclude** employment disputes involving the insurance business of a member. Because the Petitioners cannot recover without necessarily implicating the illegal nature of Respondent's insurance practice, the Petitioners' claims are squarely within the "insurance business" exception. Petitioners seek allowance of the Writ to have this issue heard.

Further, the Third Circuit Court of Appeals based its decision in part on erroneous facts presented by Prudential's counsel, Michael Barr to the United States Court of Appeals in a letter dated January 12, 1998. In that letter, Mr. Barr stated,

> As the record on appeal affirms, Prudential was a member of the NASD at the time each of the agents

executed their U-4s, at the time their employment with Prudential ended, and when prudential moved to compel them to arbitrate their disputes with the company.

The Court of Appeals' decision is based on erroneous facts presented as to Petitioners Kroll, Ybarra, Carol Hales, Willenbring and Schulenburg as each of these individuals signed their last U-4 after Prudential terminated its association with the NASD. Further, Petitioners, Kroll, Ybarra, Carol Hales, Willenbring and Schulenburg were not terminated from their employment until after May of 1996. Contrary to Mr. Barr's assertions, these individuals were still employed by Prudential at a time when Prudential was not a member of the NASD. Moreover, Prudential's motion to compel *each* of the agents to arbitrate was not filed while Prudential was still a member of the NASD, inasmuch as Judge Wolin's decision on the arbitration issue was filed on April 19, 1996. The cases of Kroll, Carol Hales, Ybarra, Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Donald Hales, Schulenburg and Bodway, the earliest of which was filed April 10, 1996, were all filed *after* Prudential had brought its motion seeking to compel arbitration and *after* Prudential terminated its association with the NASD.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CONFLICTS WITH THE OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT PERTAINING TO THE ARBITRATION OF EMPLOYMENT DISPUTES BETWEEN A MEMBER OF THE NASD AND ONE OF THE MEMBER'S REPRESENTATIVES.

This Court is asked to resolve a split in the federal circuits concerning the issue of arbitration and U-4 agreements. The United States Court of Appeals for the Seventh Circuit specifically held that the NASD arbitration procedure does *not* require arbitration of employment disputes between a member and one of its representatives. *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993). If this action were in the Seventh Circuit, the Petitioners would not be required to arbitrate their claims. Further, the Ninth Circuit in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), decided the Plaintiff was not bound to arbitrate because she did not knowingly contract to forego her statutory remedies in favor of arbitration. Therefore, the Third Circuit's opinion is based on erroneous facts, then it should not apply to the aforementioned agents and must be reversed so as to allow them to proceed to court as per the district court's opinion at *In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 924 F. Supp. 627, 640-42 (D. N.J. 1996).

Furthermore, Petitioners brought their cases in a number of different courts in different circuits, including the United

States Court of Appeals for the Seventh Circuit. Had their cases remained in the respective courts and circuits, instead of being consolidated pursuant to the rules for multi-district litigation, many of these cases would be proceeding to a jury trial.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE PARTIES EXPRESSLY AGREED TO EXCLUDE FROM ARBITRATION EMPLOYMENT DISPUTES INVOLVING THE INSURANCE BUSINESS OF RESPONDENT PRUDENTIAL.

The Third Circuit's decision effectively nullifies the "insurance business" exception language in the NASD Code. As such, the Third Circuit is in contradiction with recent Supreme Court decisions mandating that courts treat arbitration agreements like other contracts. In *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989), the United States Supreme Court made clear that the Federal Arbitration Act (FAA) while enforcing agreements to arbitrate, does not prevent parties who agree to arbitrate from excluding certain types of claims. In *Volt*, Chief Justice Rehnquist stated:

> The FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," and to place such agreements " 'upon the same footing as other contracts.' " While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." Accordingly, we have recognized that the FAA does not require parties to

> arbitrate when they have not agreed to do so, **nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.**

Id. at 476 (citations omitted) (emphasis added).

Despite the clear language as highlighted from the *Volt*, decision, in the instant case, the Third Circuit's decision nullifies the insurance business exception because the Third Circuit states that the exception is "unclear." It is obvious that when the NASD place the 1993 amendment for employment disputes directly ahead of the insurance business exception the employment disputes involving the insurance business of a member are excluded from arbitration. As stated by Judge Greenberg in his dissent,

> In my view, it is perfectly clear that the exception from arbitration for disputes involving the insurance business *must* apply to employment disputes because the exception directly follows the provision for their arbitration. While it could be argued that the exception does not apply to disputes "arising out of or in connection with the business of any member of the Association," as that phrase is more remote that the employment provision from the exception, it cannot be argued tenably that the exception jumps over the immediately preceding employment disputes provision to modify only the more remote phrase.

Dissenting Opinion, at 23a, Appendix B (emphasis in original).

Even the Third Circuit majority agrees that the Petitioners cannot prevail in their claims "without necessarily implicating the illegal nature of Prudential's insurance practices." *Majority Opinion*, at 12. Further, as stated by Judge Greenberg in his dissent,

> ". . .[I]n this case insurance disputes are at the heart of the controversies for, as the majority points out, the plaintiffs "cannot recover . . . without necessarily implicating the illegal nature of Prudential's insurance practices" and the plaintiffs' grievances, though arising out of the employment or its termination, "nevertheless implicate the legality of certain insurance practices." *Id.* At 12. ***Indeed, if the exception to the obligation to arbitrate employment controversies for disputes involving the insurance business is inapplicable here, it is difficult to understand when it ever would be applicable.*** . . . [T]o me this case is fairly clear and the generalized policy in favor of arbitration cannot over come the plain meaning of the Code.

Dissenting Opinion, at 24a, Appendix B (emphasis added). In accord with Judge Greenberg, the Petitioners cannot imagine any employment claim that more directly involves the business of insurance. Thus, there has been an agreement between the NASD and the Petitioners *not* to arbitrate employment disputes involving the business of insurance. Accordingly, if two parties can agree to arbitrate some categories of claims and *exclude* employment disputes involving the business of insurance from arbitration, the Third Circuit's decision is in error.

In *Kaplan v. First Options of Chicago, Inc.*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995), the Supreme Court again made clear that arbitration agreements are contracts that

should be applied according to their terms. The *Kaplan* Court stated:

> [A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration . . . After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms.

Id. at 514 U.S. __, 115 S. Ct. 1924-25 (citations omitted) *See also* the Third Circuit's decision in *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1294 (3rd Cir. 1996). Again, as recognized by Judge Greenberg in his dissenting opinion,

> It is one thing to construe a contract to require the arbitration of a dispute. But it is quite another to rewrite a contract to require arbitration. A court simply cannot do that.

Dissenting Opinion, at 23a, Appendix B.

In the present action, Petitioners and Prudential did not agree to arbitrate employment disputes involving the business of insurance Further, in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), the Court held that the Plaintiff was not bound to arbitrate her employment disputes, because she did not knowingly contract to forego her statutory remedies in favor of arbitration. Similarly, in the Petitioners' cases, where the NASD's own rules except employment disputes involving the business of insurance, the Petitioners must not be compelled to arbitrate when their contracts do not include arbitrating their claims.

As the majority of the Third Circuit held, Petitioners cannot recover under their theories of liability without proving the illegal nature of Prudential's insurance practices as the majority of the Third Circuit held *Majority Opinion*, at 14a, Appendix B. As such, Petitioners' claims necessarily involve the business of insurance of Prudential. Accordingly, Petitioners did not agree to arbitrate their pending claims and for that reason this Writ should be granted.

A further reason that this Writ should be granted is the existence of a significant split between the circuits regarding whether arbitration can be compelled. The Seventh Circuit Court in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), held that NASD arbitration rules did not require arbitration of employment claims in that case. The Ninth Circuit agreed in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), where the court held that plaintiffs were not bound to arbitrate their employment disputes.

However, in the recent decision by the United States Court of Appeals for the Third Circuit, in this action, it has been held that the Petitioners must bring their claims to arbitration even though the business of insurance is at the heart of the controversies between the Petitioners and Prudential.

Thus, two circuits would allow the Plaintiffs to go ahead with their claims in court, while only one would compel arbitration. Furthermore, the identical issue would currently be decided differently in the State of New Jersey depending on whether the litigation was in state or federal court. In *Young v. Prudential Ins. Co.*, 688 A.2d 1069 (N.J. Super. Ct. App. Div. 1997), the New Jersey court held that the "business of insurance" exception mandated that the Plaintiff was not required to arbitrate his employment dispute involving the insurance business of Defendant Prudential Insurance Company. In

addition, the Alabama Supreme Court has held that the NASD Code does not compel arbitration of employment disputes that fit within the "insurance business" exception. *Hagan v. Minnesota Mutual Life Ins. Co.*, No. 1961751 (Ala. 1998). Thus, whether an individual would be required to arbitrate their claim would be decided solely upon the forum in which the Plaintiff brought the action.

Consequently, there exists a split between several circuits of federal courts and again between the federal courts and the state courts as to whether the NASD Code of Arbitration requires arbitration of the Petitioners' employment disputes involving the business of insurance. There is also a split between the United States Supreme Court and the United States Court of Appeals for the Third Circuit as to whether the contract regarding arbitration shall be strictly construed or whether the agreement shall be overruled by presumption favoring arbitration.

Further reasons exist for granting this Writ. First, the Third Circuit Court of Appeals appears, in part, to have based its decision on erroneous facts,

> There is no question that Prudential is a member of the NASD and the plaintiffs are associated persons within the meaning of the Code.

Majority Opinion, at 10a, Appendix B. This fact was further referenced in a letter by Prudential's counsel Michael Barr, dated January 12, 1998, to the Third Circuit Court of Appeals in which he said,

> As the record on appeal confirms, Prudential was a member of the NASD at the time each of the agents executed their U-4's, at the time their employment with Prudential ended, and when Prudential moved to compel them to arbitration their disputes with the company.

As previously noted, the above statement is not accurate in that Petitioners Kroll, Carol Hales, Ybarra, Willenbring and Schulenburg were each terminated from their employment with Prudential after May of 1996, the date which Prudential terminated its association with the NASD. Because their employment continued after the date when Prudential was no longer a member of the NASD, these agents executed a U-4 at a time when Prudential was not an NASD member. Further, Petitioners Carol Hales, Ybarra, Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Donald Hales, Schulenburg and Bodway each filed their cases *after* Judge Wolin's April 19, 1996, Order denying Prudential's motion to compel arbitration. In May of 1996, Prudential terminated its association with the NASD. Thus the cases of Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Donald Hales, Schulenburg and Bodway, all filed after May of 1996, were filed at a time when Prudential was no longer a member of the NASD contrary to Barr's assertion in his letter of January 12, 1998. Because a substantial number of the Petitioners herein did not even file their cases until *after* Prudential's motion to compel arbitration had already been decided and it had terminated it relationship with the NASD, it is impossible, for Prudential to have been a member of the NASD at the time that it filed a motion to compel the aforementioned Petitioners to arbitrate their claims as asserted in Barr's letter.

Second, a great unfairness has been created by the Third Circuit Appeals Court decision reversing the district court's decision that the business of insurance exception applies in this instant case to preclude arbitration. When a substantial number of the Petitioners and their attorneys were deciding how to proceed with their cases, in which court to file their claims, and whether to proceed in an MDL action, the law in the Third Circuit would not have compelled arbitration. Only now, after the cases have been filed, did the Third Circuit decision unexpectedly change how the Plaintiffs' claims are treated.

Finally, the Petitioners in these cases are residents of various states from across the United States. Their rights are subject to being greatly and adversely affected by having their cases first consolidated in a multi-state district in New Jersey and then decided in New Jersey where the law regarding arbitration is now at odds with the other circuits. Petitioners from different forums where they may not normally have had to arbitrate their claims have been prejudiced by being forced to participate in a multi-district panel that happens to be in New Jersey within the Third Circuit. As a result of the split of the federal circuits which affect not only the rights of the Petitioners herein, but also the rights of employees, agents and representatives of insurance companies nationwide that the United States Supreme Court should decide how these cases should be handled. Based on the forgoing arguments, the Court should settle the law and find that the Petitioners must not be compelled to arbitrate.

CONCLUSION

It is a question of exceptional national importance to thousands of employees throughout the United States whether parties have the right to agree to arbitrate some claims and agree to exclude other types of claims from arbitration. It may appear from the Supreme Court's *Volt* decision that the circuit courts have already received guidance on this issue, however that cannot be true as evidenced by the Third Circuit's decision in this case. The facts are rather simple. The parties agreed to exclude employment disputes from arbitration when they involve the insurance business of Respondent Prudential. Even the majority opinion from the United States Court of Appeals for the Third Circuit states that the Petitioners *must* implicate the illegal nature of Respondent's insurance practices in order to prevail on their claims. The NASD Code of Arbitration provides a clear exception to compelling arbitration when the dispute involves the business of insurance. The Petitioners' claims

plainly involve Prudential's insurance business. Thus, Petitioners' claims fit squarely within the "insurance business" exception found in the NASD Code and the Third Circuit's decision compelling arbitration must be reversed.

The Plaintiffs have been placed in the unfair position where the New Jersey Court dismissed the Petitioners' cases before they had the opportunity to raise key issues raised in this appeal including the issues regarding compliance with the NASD Code of Arbitration. Further, Prudential was not a member of the NASD when law suits were commenced by Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Don Hales, Schulenburg, and Bodway so that arbitration should not be compelled. We respectfully ask this Court to find that arbitration is not required so that Petitioners will be allowed to have their cases heard in a court of law.

Prudential presented erroneous facts to the Third Circuit Court of Appeals that acted as a basis for its decision. It is clear that the statement set forth in Barr's letter of January 12, 1998, is not accurate. Prudential *was not* a member of the NASD as asserted at the time that *each* of the agents executed their U-4s, or at the time their employment with Prudential ended, or when Prudential moved to compel them to arbitrate their disputes with the company. To the extent that the Third Circuit's decision was based on these erroneous facts it must be reversed.

Finally, the arbitration issue in this case affects not only the immediate parties to this case, but also each and every employee, agent and representative of an insurance company who is required to sign a U-4 application.

Furthermore, Petitioners brought their cases in a number of different courts in different circuits, including the United States Court of Appeals for the Seventh Circuit. Had their cases

remained in the respective courts and circuits, instead of being consolidated pursuant to the rules for multi-district litigation, many of these cases would be proceeding to a jury trial.

As it stands at this moment, there exists a split among the circuits and between state and federal courts as to the applicability of the business of insurance exception to the arbitration requirements of the NASD Code. It is clear that the amendment to the NASD Code in 1993 clearly excepted employment disputes from arbitration when they involved the business of insurance. As stated by Judge Greenberg in his dissent,

> . . . if the exception to the obligation to arbitrate employment controversies for disputes involving the insurance business is inapplicable here, it is difficult to understand when it ever would be applicable.

Dissenting Opinion, at 24a, Appendix B.

For the foregoing reasons, Petitioners respectfully request that the Third Circuit's decision be reversed and the Petitioners be allowed to proceed with their cases in court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

96-5329

IN RE: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION ALL AGENT ACTIONS

HERBERT SCHULTE, MDL transfer; S.D. Illinois; DNJ civ. 95-4740; MICHAEL D. GORDON, MDL Transfer; W.D. Kentucky (Paducah); DNJ Civil Action 95-4738; RICK A. MARTIN, MDL transfer, W.D. Kentucky (Paducah), DNJ Civil Action 95-5013; KENNETH R. YOUNG, MDL transfer, M.D. Florida (Tampa), DNJ Civil Action 95-5010, MICHAEL WEAVER, MDL transfer, S.D. Illinois (E. St. Louis), DNJ Civil Action 95-5011

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant

Present: BECKER, *Chief Judge,* SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE, RENDELL and SEITZ*, *Circuit Judges*

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* As to panel rehearing only.

Appendix A

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Greenberg would have granted rehearing.

BY THE COURT,

s/ [illegible]
Circuit Judge

DATED: February 23, 1998

cmh/cc: MHB
DOK
NJM
JBM
KWS
KRS

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 7, 1998

Filed January 7, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5329

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*IN RE: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION
ALL AGENT ACTIONS

HERBERT SCHULTE, MDL transfer; S.D. Illinois; DNJ Civ. 95-4740; MICHAEL D. GORDON, MDL Transfer; W.D. Kentucky (Paducah); DNJ Civil Action 95-4738; RICK A. MARTIN, MDL transfer, W.D. Kentucky (Paducah), DNJ Civil Action 95-5013; KENNETH R. YOUNG, MDL transfer, M.D. Florida (Tampa), DNJ Civil Action 95-5010; MICHAEL WEAVER, MDL transfer, S.D. Illinois (E. St. Louis), DNJ Civil Action 95-5011

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant

*(Amended as per the Clerk's 6/20/96 Order)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 95-cv-04704)

Argued September 8, 1997

BEFORE: GREENBERG, ALITO and SEITZ,
Circuit Judges.

(Opinion Filed: January 7, 1998)

Appendix B

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

This appeal presents a novel question in this court of whether the "insurance business" exception found in the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure precludes arbitration of employment disputes that implicate insurance issues.[1]

I. Background

A. Facts and Procedural History

Certain questionable sales practices of the Prudential Insurance Company of America ("Prudential") gave rise to

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1. The district court relied on diversity jurisdiction, 28 U.S.C. § 1332, and federal question jurisdiction, 28 U.S.C. § 1331, to entertain plaintiffs' state law claims and causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. We exercise jurisdiction under the Federal Arbitration Act, 9 U.S.C. §§ 16(a)(1)(A) and 16(a)(1)(C). Because this appeal presents a legal question concerning the applicability and scope of an arbitration agreement, our standard of review is plenary. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1113 (3d Cir. 1993).

several lawsuits against it by former employees.[2] Plaintiffs are former Prudential sales agents who brought suit alleging that Prudential took adverse employment action against them in alleged retaliation for their refusal to participate in the company's insurance sales fraud. In response to the plaintiffs' action, Prudential moved, under section 3 of the Federal Arbitration Act, to compel arbitration of plaintiffs' claims. Prudential relied upon the fact that each plaintiff had signed a Uniform Application for Securities Industry Registration or Transfer ("Form U-4") which incorporated by reference the arbitration provisions of the NASD Code. The plaintiffs opposed the motion, arguing that Prudential could not invoke Form U-4 because it is not a party to that agreement, and, in the alternative, that the Code contains an exception for disputes involving the "insurance business" which would preclude arbitration in this case.

Upon considering the contested motion, the district court held that Prudential could seek to enforce the arbitration agreement even though it is not a signatory to Form U-4. Having ruled that Form U-4 applied to the appropriate parties, the court addressed whether the arbitration agreement covered the legal claims pressed by the plaintiffs. Interpreting the scope of the agreement embodied in Form U-4, the court found that the relevant language applied to the plaintiffs' causes of action.

Finally, the court examined the insurance business exception, which would potentially exempt arbitration in this case. While recognizing a liberal federal policy in favor of arbitration, the court nevertheless held that the exception applied on the ground that plaintiffs' claims are "intricately related" to Prudential's insurance business. It added that the looming class action suits against Prudential may raise the same issues as those subject to arbitration. This consideration, in the district court's view, compelled a finding favoring the application of the

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2. These lawsuits were consolidated with actions brought by Prudential policyholders before the District Court pursuant to 28 U.S.C. § 1407. Because Prudential sought to compel arbitration only against the plaintiffs, the policyholder claims are not before us in this proceeding.

exception. Accordingly, the court denied Prudential's motion under the Arbitration Act. This appeal followed.

B. The Arbitration Provisions

The resolution of the issues in this appeal first calls for a parsing of the relevant documentation and, in particular, the language of Form U-4 itself.[3] This form provides that the applicant agreed to:

> arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the ... [NASD] as may be amended from time to time.

Form U-4 further states that each applicant will:

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the ... [NASD] as they are and may be adopted, changed or amended from time to time....

Incorporated by reference through these two provisions is the NASD Code of Arbitration. Part I Section One of the Code articulates which matters are eligible for arbitration:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the [NASD], or arising out of the employment or termination of employment of associated persons(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (1) between or among members;
>
> (2) between or among members and associated persons;

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3. The relevant language at issue refers to the most current Form U-4 and the NASD Code of Arbitration, as amended in 1993. Although the plaintiffs had argued before the district court that the pre-1993 Code of Arbitration applied, they do not raise that contention on appeal.

(3) between or among members or associated persons and public customers, or others; and

(4) between or among members, registered clearing agencies with which the [NASD] has entered into an agreement to utilize the [NASD] arbitration facilities and procedures, and participants, pledges, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

Part II Section 8 of the Code mandates arbitration for "[a]ny dispute, claim, or controversy eligible for submission under Part I of this Code between or among members and/or associated persons...."

All the plaintiffs signed Form U-4 as a condition precedent to their employment at Prudential.[4] Prudential, however, is not a signatory to the agreement.[5] Rather, the "firm" identified in Form U-4, is Pruco Securities Corp., a wholly-owned Prudential subsidiary.

II. Arbitration

A. Prudential's Standing

A threshold inquiry under the Federal Arbitration Act is to determine, under recognized principles of contract law, the validity of, and the parties bound by, the arbitration agreement. As explained by the Supreme Court, " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *AT&T Technologies v. Communications Workers of America, et al.*, 475 U.S. 643,

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4. We note that plaintiffs Martin and Schulte signed an earlier version of Form U-4, which differed slightly from the agreement signed by the remaining plaintiffs. The provisions at issue in this appeal, however, are materially identical.

5. The Form U-4 agreement is more correctly understood as between the plaintiffs and the NASD. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2. (1985).

648 (1986) (quoting *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The identification of the parties bound by the agreement to arbitrate need not be confined to the limited inquiry of identifying the signatories to the arbitration agreement. Rather, the dispositive finding is an "'express' and 'unequivocal'" agreement between parties to arbitrate their disputes. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1512 (3d Cir. 1994) (citations omitted), *aff'd*, 514 U.S. 938 (1995).

As this court has previously recognized, "a variety of non-signatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles." *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 938 (1985) (citations omitted), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 (3d Cir. 1993). Indeed, courts have been willing to apply third party beneficiary law in examining the contractual standing of a non-signatory party to a dispute, provided there is an expression of the requisite intent between the third party and the plaintiff to arbitrate their claims. *See McPheeters v. McGinn, Smith & Co.*, 953 F.2d 771, 772-73 (2d Cir. 1992) (per curiam); *Nesslage v. York Sec., Inc.*, 823 F.2d 231, 233-34 (8th Cir. 1987); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1116-17 (1st Cir. 1986); *Stone v. Pennsylvania Merchant Group, Ltd.*, 949 F.Supp. 316, 320-21 (E.D.Pa. 1996).

The parties in this case do not contest the validity of the arbitration clause itself. Rather, they dispute the identity of the parties bound by Form U-4.[6] At the outset, we do not find Prudential is without standing here simply because it is not a signatory to the arbitration argument; nor will we deny standing because Pruco is listed as the only "firm" referenced in Form U-4. Instead, we turn to the text of the Form U-4 arbitration agreement to see if there is an express

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6. The parties raise this issue in response to this court's direction to address the significance, if any, of *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, 117 S.Ct. 583 (1996), to this case.

and unequivocal intent that the plaintiffs would arbitrate their claims against, *inter alia*, Prudential, and whether "both parties to the contract express an intention to benefit the third party in the contract itself...." *Scarpitti v. Weborg*, 530 Pa. 366, 372-73, 609 A.2d 147, 150 (1992); *see also* Restatement (Second) of Contracts § 302(1)(b) (1981).

As stated in Form U-4, the plaintiffs agreed to arbitrate any dispute not only with Pruco, but also with "any other person" where the claim itself would be subject to arbitration under the NASD Code. Pursuant to section 8 of the NASD Code, plaintiffs agreed to arbitrate certain disputes "between or among members and/or associated persons...." There is no question that Prudential is a member of the NASD, and the plaintiffs are associated persons within the meaning of the Code.[7] Thus, we conclude, as did the district court, there is a clear and unequivocal intent to arbitrate claims with third parties such as Prudential, and not just Pruco, to the extent they are eligible for arbitration under § 1. *Cf. Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 799 n.7 (10th Cir. 1995) (finding an intent to arbitrate with Prudential as well

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7. An "associated person" is defined as:

> every sole proprietor, partner, officer, director, or branch manager of any member, or any natural person occupying a similar status or performing similar functions, or any natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by such member....

NASD By-Laws ¶ 1101(q). We find no merit to plaintiff Young's argument that he is not an "associated person" within the meaning of the NASD Code. Indeed, Young's entire theory of recovery is premised on the fact that he was a Prudential employee with authority to trade in securities. Young would certainly be an "associated person" for purposes of the Securities Exchange Act, which uses similar language as the NASD's definition and provides the statutory basis for the NASD. *See* 15 U.S.C. § 78c(a)(21); *Kaplan*, 19 F.3d at 1517; *Cular v. Metropolitan Life Ins. Co.*, 961 F.Supp. 550, 556-57 (S.D.N.Y. 1997). Even if Young, as an employee, is not an associated person for purposes of the NASD definition, his degree of involvement in these disputes would, at the very least, place him as a "certain other" under Section 8 of the NASD Code. *See Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60, 67-68 (2d Cir. 1996).

as Pruco through the maintenance of registration with Prudential).

Moreover, it is clear from the text and purpose of Form U-4, that the parties to the agreement intended to benefit such non-signatory, third parties as Prudential. While Form U-4 is only an agreement between the NASD and the applicant, it was adopted as a broader effort by self-regulatory organizations, including the NASD, to regulate the securities industry.[8] *See* 1 Ian R. MacNeil, et al., Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act § 13, at 3-8, 43-44 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L.Rev. 83, 146 (1996). The intention, as Form U-4 unambiguously indicates, was not limited to arbitrating disputes between the NASD and the applicant or member "firms" explicitly recognized in the text. Rather, the arbitration agreement and the NASD Code of Arbitration establish certain classes of individuals — member firms of the NASD, customers, and so on — who would benefit from the applicant's agreement with the NASD. The applicant, in return, would become a registered broker with the NASD and could properly conduct business under the federal securities laws. Therefore, we have no doubts that the parties to Form U-4 unequivocally intended that each applicant would submit to arbitration against non-signatory third parties such as Prudential. A holding that would restrict the right of these third parties to invoke arbitration because they had not signed Form U-4 would essentially require the NASD and the applicants to seek explicit textual recognition of all intended beneficiaries, whether known or unknown. We think such a requirement would frustrate the purpose and text of Form U-4 and accordingly hold that Prudential may properly seek enforcement of the arbitration clause against the plaintiffs.

This case is distinguishable from *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, 117 S.Ct. 583 (1996), where we held that a non-signatory parent

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8. In fact, the Securities Exchange Act of 1934 requires brokers and dealers to register with, and submit to the rules of, the NASD as a condition to trading in securities. 15 U.S.C. § 78o(b)(8).

corporation cannot "by reason of their corporate relationship" enforce an arbitration clause, signed by a wholly-owned subsidiary, absent an express agreement to that effect. *Id.* at 1297. In *Dayhoff*, unlike the scenario before us, there was no unambiguous expression of intent between the parties to the arbitration agreement to create a class of intended beneficiaries who might invoke arbitration. *Id.* at 1296-97. In addition, the *Dayhoff* panel was particularly concerned that the non-signatory parent corporation had essentially created an "option to accept or reject the arbitration and forum selection clauses...." *Id.* at 1297. The panel found that the existence of "such a choice belie[d] the existence of an agreement" to arbitrate. *Id.* Such is not the case here.

B. The Nature of the Dispute

Having found that Prudential has standing to seek enforcement of the arbitration agreement against the plaintiffs, the next step in the analysis is to identify the nature of the dispute at issue and the scope of the arbitration clause. Because arbitration clauses are fundamentally a creature of contract law, the critical focus is on a clear intention to arbitrate a specific claim or dispute between the parties. In the court's undertaking to determine the parties' intent, the analytical tools of ordinary contractual interpretation become relevant. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citations omitted).

It is important to note that the Federal Arbitration Act provides the authority for the enforcement of arbitration clauses as a matter of federal law and, as such, federal policies govern. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1982). The Federal Arbitration Act reflects a pervasive federal interest in promoting arbitration and encouraging courts to uphold arbitration clauses. *See id.* The underpinnings of this strong federal policy in favor of arbitration have been exhaustively reviewed by the Supreme Court, and need not be reiterated here. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985); *Moses*

H. Cone, 460 U.S. at 24-25. However, we will emphasize certain settled principles of federal arbitration law that are relevant here.

Any inquiry into the scope of an arbitration clause must necessarily begin with the presumption that arbitration applies. In considering the nature of the dispute and the scope of the arbitration clause, this court must operate under a "presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *AT&T Technologies*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83). Thus, when it cannot be said "with positive assurance" that the parties have clearly and unequivocally excepted a certain dispute from arbitration, the court must compel arbitration. A necessary corollary of this axiomatic rule in favor of arbitration is that doubts in interpreting the precise scope of the arbitration agreement are to be resolved in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24. While this approach is not a mandate for courts to ignore explicit textual agreements or to reshape the parties' obvious intent, it nevertheless weighs genuine ambiguities against the resisting party. *Painewebber Inc. v. Hartmann*, 921 F.2d 507, 512-13 (3d Cir. 1990).

With these principles in mind, we turn to the nature of the disputes here in order to determine whether they fall within the scope of the relevant arbitration clause. The plaintiffs have alleged various state violations — employment, contractual, and tortious in nature — based on their discharge in retaliation for their refusal to participate in the alleged fraudulent insurance practices of Prudential. Several plaintiffs have also alleged RICO violations in which the requisite predicate acts of racketeering activity involve Prudential's insurance fraud. These plaintiffs allege that RICO standing under 18 U.S.C. § 1964(c) stems from the injury caused by wrongful employment termination.

No party contests the employment nature of the plaintiffs' claims. Indeed, all the causes of action set forth revolve around the damage suffered through Prudential's decision

to terminate employment or intentionally interfere with the plaintiffs' business expectations as insurance agents. Unique to these claims, however, is the involvement of Prudential's insurance business in the dispute. The plaintiffs cannot recover under their various theories of liability without necessarily implicating the illegal nature of Prudential's insurance practices. To this extent, the grievances cited by the plaintiffs are accurately described as arising out of the employment or termination of employment, but they nevertheless implicate the legality of certain insurance practices. We cannot simply ignore, as some other courts seem to have done, the insurance aspects of this case. *See, e.g., Metropolitan Life Ins. Co. v. Lindsay*, 920 S.W.2d 720 (Tex. App. Ct. 1996); *Prudential Ins. Co. Of America v. Shammas*, 865 F.Supp. 429, 432 (W.D. Mich. 1993); *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152 (E.D. Pa. 1994) (unreported disposition). Rather, we identify the issues raised by the plaintiffs in order to determine whether they fall within the intended scope of arbitration.

C. Scope of the Arbitration Agreement and the Insurance Exception

Given the nature of the dispute, we address the agreement embodied in Form U-4 and the NASD Code incorporated by reference in order to ascertain whether this controversy falls within the intended scope of arbitration. Form U-4 itself merely provides that the parties agree to arbitrate any dispute that is required to be arbitrated under the NASD Code. The Code's language is broadly drafted and covers:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the [NASD], or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company....

NASD Code § 1. At the very least, the section's plain language differentiates between two types of disputes, both

of which are arbitrable. There is no question that the parties intended to arbitrate any dispute "arising out of the employment or termination of employment". Beyond these employment disputes, claims "in connection with the business of members" are also within the intended scope of arbitration.

The language of the Code carves out an exception where the dispute involves the "insurance business of any member." In these situations, there is a clear intent not to arbitrate but rather to leave the matter within the province of the courts. Less clear, however, is the coverage of this exception, as several ambiguities immediately arise in the clause's interpretation. For example, it is not clear whether the business of insurance exception applies to employment related disputes, to disputes in connection with a member's business, or to both.[9] More importantly, neither the Code nor NASD by-laws defines what is meant by the "insurance business" and the intended scope of its coverage.[10]

The history of NASD Code § 1 reflects the above conclusions, but sheds little light on the scope of arbitration or the insurance business exception. Before 1993, § 1 made the following claims eligible for arbitration: "any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company...." 58 Fed. Reg. 39,070 (1993). At this point, it was clear that the insurance business exception

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9. We note that under settled principles of statutory construction, the doctrine of the last antecedent phrase would suggest that the business of insurance exception applies *only* to the phrase immediately preceding it which, in this case, is employment disputes. *See* Norma J. Singer, Statutes and Statutory Construction § 47.26, at 240-41 (5th ed. 1992); 24 Words and Phrases, *Last Antecedent* 453-66 (1966).

10. Counsel for Prudential would have us rely on such Supreme Court cases as *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) which define the "business of insurance" for purposes of the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. This suggestion, however, is beside the mark. What Congress intended by "insurance" for purposes of the McCarran-Ferguson Act is simply irrelevant to how the parties before us define insurance and the scope of disputes subject to arbitration.

only applied to disputes in connection with a member's business. The stated purpose of the exception was to:

> exclude ... disputes on [the] belief that the number of insurance-only claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are intrinsically insurance, that is, matters with respect to which the Association does not believe it should mandate arbitration.

44 Fed. Reg. 75,255 (1979). The intent to be inferred from this phrase is that where the dispute is "insurance-only" or even "intrinsically insurance" it falls beyond the scope of arbitration. But apart from a stated concern regarding the sheer volume of insurance claims, nothing further suggests what is meant by an "intrinsically insurance" dispute or a claim that is "insurance only".

In 1993, however, the NASD amended the section to include the phrase, "or arising out of the employment or termination of employment of associated person(s) with any member". 58 Fed. Reg. at 39,070. The stated intent behind this amendment was to "assure that the arbitration of industry employment disputes may be compelled at the instance of one of the parties to the dispute." *Id.* at 39,071. Moreover, the NASD intended the newly proposed clause to be read broadly so that employment disputes that also invoked matters "involving public policy issues" would still be arbitrated. *Id.* at 39,071-72. To illustrate, the amendment provided "that in cases involving employment discrimination claims or claims involving public policy issues, the panel should consist of a majority of public arbitrators." *Id.* at 39,071. Nevertheless, the NASD did not comment as to the potential interplay between the employment clause and the insurance business exception so as to illuminate the intended scope of arbitrable disputes in that context.

As a result, we are left with an unanswered question that is at the heart of this case — namely, whether employment disputes that implicate a member's insurance business fall

under the insurance business exception. On the one hand, it is clear, from both the language of the text and its history, that employment disputes were unequivocally intended to be arbitrated. This is so even if the employment claim raises policy matters well beyond the narrow legal issue of contract breach or ordinary employment torts. These would include, for instance, discrimination based on age, sex, or race. *See* 58 Fed. Reg. at 39,071.

On the other hand, the NASD has expressed a clear and unequivocal intent not to arbitrate "insurance-only" or "intrinsically insurance" claims. The contours of an "insurance-only" or "intrinsically insurance" claim are too amorphous to define with precision in the present factual context, especially where it is the exception to a broad arbitration provision. We can easily imagine scenarios, such as the one before us, where a claimant, in order to recover on normally arbitrable disputes, would require the arbitrator to decide insurance issues. Thus, it would be difficult to unambiguously announce, on the basis of the NASD Code and its drafting history, whether the parties intended that these sorts of controversies are "intrinsically insurance" without any further indication of the meaning of the phrase. In the end, we are left wondering to what extent, if any, the desire not to arbitrate "intrinsically insurance" disputes was meant to override the parties' intention to arbitrate employment disputes — broadly read — when the controversy implicates both employment and insurance aspects.

Courts that have grappled with this conundrum generally attempt to isolate certain aspects of the dispute and ascertain whether they pose central insurance questions. *See, e.g., Young v. Prudential Ins. Co. of America*, 688 A.2d 1069, 1081 (N.J. Super. Ct. App. Div. 1997) (looking to whether insurance practices are "at the heart of [the] case"); *Vitone v. Metropolitan Life Ins. Co.*, 943 F.Supp. 192, 198 (D.R.I. 1996) (inquiring whether a "comprehensive evaluation" of the defendant's insurance business would be required to resolve plaintiff's claims); *Wojcik v. Aetna Life Ins. and Annuity Co.*, 901 F.Supp. 1282, 1291-92 (N.D.Ill. 1995) (requiring plaintiff to allege unlawful insurance practices and not merely wrongful employment conduct

directed toward plaintiff); *Prudential Ins. Co. of America v. Shammas*, 865 F.Supp. 429, 432 (W.D.Mich. 1993) (looking for claims that invoke a "specific[]" relationship with insurance); *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152 (E.D. Pa. 1994) (unreported disposition) (looking to the "actual basis" of plaintiff's claim).

While it is possible to construe the insurance business exception so that an employee's claim is "intrinsically insurance" or "insurance-only" once the claim requires a resolution of a central insurance question, such an interpretation fails for several reasons. Assuming that the business of insurance exception applies to employment disputes, there is nothing in the NASD Code or its drafting history to indicate the degree of insurance involvement in a dispute that would constitute an "intrinsically insurance" claim. Looking to the purpose behind the exception — a concern for case volume — does not aid the inquiry, as no party has made the contention that the types of claims involved here would threaten an overload on securities arbitrators.[11]

If this court were to determine how the insurance exception applies to employment disputes, without any guidance as to the meaning of the phrase "intrinsically insurance," our decision very well might frustrate the intent of the parties. However, because federal arbitration law requires doubts to be resolved against the resisting party, we need not grope for a rule that would resolve the ambiguity here.[12] Instead, we are not inclined to expand the

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11. The district court surmised that the driving force behind the exception is a general lack of expertise by securities arbitrators to consider insurance claims. Although this may be true, neither the NASD Code nor its drafting history posits this as a concern to the parties.

12. In fact, the text of the Code itself phrases the exception as any dispute "involving" the insurance business while the NASD's expression of purpose seems to limit the exception to "insurance-only" or "intrinsically insurance" claims. Because the word "involvement" indicates a more relaxed relationship to insurance issues than does the word "intrinsically" we are faced with a patent ambiguity of the parties' intent. Under settled contract principles, we must give effect to "all circumstances" behind the contractual term including "the principal purpose of the parties." Restatement (Second) Contracts § 202(1).

exception without a clear indication of the parties' purpose and intended scope of coverage.[13]

We ultimately cannot say with positive assurance that the language of Form U-4 and the NASD Code, as well as their drafting histories, indicate the parties' desire not to arbitrate employment disputes that require the resolution of an insurance business issue. There is only one clear expression of intent here — that employment disputes are subject to arbitration while "intrinsically insurance" claims are not. Because this court cannot say with certainty what is meant by "intrinsically insurance" claims, and whether it embraces employment disputes, our mandate is clear: a presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties. Thus, we will reverse the district court's ruling that the insurance business exception exempted the plaintiffs' claims from arbitration in this case.[14]

III. Policy Grounds and Arbitration

In addition to the textual interpretation of the insurance business exception, the district court offered another reason for its denial of arbitration: a concern for potential "inconsistent results and inefficiencies" given the dozens of putative class actions against Prudential. Although the court recognized that this factor alone cannot justify a reformation of a binding arbitration contract, it nevertheless considered the peculiar class action ramifications as a persuasive factor against committing the disputes to an arbitration forum.

While we share the district court's apprehension toward inconsistent results and inefficiencies caused by

---

13. Indeed, if this text were a statute, the ordinary canons of statutory interpretation would mandate a narrow construction of the exception in the presence of ambiguity. *See* Norma J. Singer, Statutes and Statutory Construction § 47.11 (5th ed. 1992).

14. With respect to the plaintiffs' RICO cause of action, we note that the Supreme Court has already approved arbitration of RICO claims pursuant to a pre-existing arbitration agreement. *See Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

arbitration, we cannot frustrate the enforcement of the arbitration clause pursuant to the Federal Arbitration Act on the basis of this concern. As the Supreme Court noted in *Moses H. Cone*:

> [F]ederal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

460 U.S. at 20 (emphasis in original) (footnotes omitted). Although the Court in *Moses H. Cone* considered the possibilities of duplicative and piecemeal litigation in terms of federal abstention doctrine, the interest in enforcing federal arbitration law is the same in other situations. *See, e.g., Barrowclough*, 752 F.2d at 938 (holding that an arbitration clause against certain parties may be enforced even if other parties were not subject to arbitration); *Dayhoff*, 86 F.3d at 1298 (enforcing an arbitration clause even if a party may have to "litigate its claims in three different fora with three different sets of rules").

The Eighth Circuit Court of Appeals, for example, specifically rejected the view that arbitration was improper when multi-district litigation may create duplicative litigation and a potential for inconsistency. *In re Piper Funds, Inc., Institutional Government Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995). As the Supreme Court broadly stated, the Federal Arbitration Act was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not ... allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (footnote omitted). Accordingly, we will also reverse the district court's ruling based on judicial efficiency and consistency.

IV. Conclusion

For the foregoing reasons, the order of the district court will be reversed, to the extent it denied Prudential's motion

compelling arbitration. and the matter will be remanded for further appropriate proceedings.

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Appendix B

GREENBERG, *Circuit Judge*, dissenting in part.

While I agree with the majority that Prudential may seek enforcement of the arbitration clause, I respectfully dissent from its conclusion that the plaintiffs' claims are subject to arbitration. I will set forth my reasons briefly. The NASD Code, following its 1993 amendment, reads as follows:

> This Code . . . is prescribed . . . for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or [dispute, claim or controversy] arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company . . .

The underscored words were added in 1993 and I have inserted "dispute, claim or controversy" within them for clarity because obviously arbitration is of a dispute, claim or controversy.

Prudential, which contends that the insurance exception is inapplicable in an employment dispute, see br. at 18, effectively would rewrite the Code so that it reads as follows:

> This Code . . . is prescribed . . . for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, with the exception of disputes involving the insurance business of any member which is also an insurance company, or [for the arbitration of any dispute, claim or controversy] arising out of the employment or termination of employment of associated person(s) with any member.

I say that Prudential would rewrite the Code to read as I have indicated because the rewritten version renders the exception for "disputes involving the insurance business" inapplicable in disputes arising out of employment or its termination. Relying on its rewritten version of the Code, Prudential explains that "[o]nly disputes predicated directly on Prudential's contractual or other insurance-related

obligations to policyholders, rather than its role and obligations as an employer, properly fall within the scope of the business of insurance exception." Br. at 3.

Prudential's position is untenable. I am well aware that the courts look generously at the scope of arbitration clauses. Nevertheless, except in certain situations in which statutes require arbitration, a party only need arbitrate disputes which he or she agrees to arbitrate. *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1294 (3d Cir.), *cert. denied*, 117 S.Ct. 583 (1996). In my view, it is perfectly clear that the exception from arbitration for disputes involving the insurance business *must* apply to employment disputes because the exception directly follows the provision for their arbitration. While it could be argued that the exception does not apply to disputes "arising out of or in connection with the business of any member of the Association," as that phrase is more remote than the employment disputes provision from the exception, it cannot be argued tenably that the exception jumps over the immediately preceding employment disputes provision to modify only the more remote phrase. It is one thing to construe a contract to require the arbitration of a dispute. But it is quite another to rewrite a contract to require arbitration. A court simply cannot do that.

The majority indicates that "[t]he plaintiffs cannot recover under their various theories of liability without necessarily implicating the illegal nature of Prudential's insurance practices." Majority Opinion at 12. The majority thus sets forth that "the grievances cited by the plaintiffs are accurately described as arising out of the employment or termination of employment, but they nevertheless implicate the legality of certain insurance practices." *Id.* at 12. I agree with these points and thus I would affirm because the obligation to arbitrate employment disputes excludes "disputes *involving* the insurance business of any member which is also an insurance company." (Emphasis added.) Indeed, I regard this case as fairly straightforward. After all, a dispute implicating the legality of insurance practices surely is a dispute involving an employer's insurance business.

Appendix B

The majority concludes that there must be arbitration here in part because of ambiguities in the Code. It indicates that "it is not clear whether the business of insurance exception applies to employment related disputes, to disputes in connection with a member's business, or to both," *id.* at 13, and that is uncertain "whether employment disputes that implicate a member's insurance business fall under the insurance business exception." *Id.* at 14-15. I respectfully disagree because as I have indicated the provision for arbitration of employment disputes directly precedes the insurance business exception.

The majority expresses concern about the scope of the insurance business exception. I certainly agree that the scope could be a problem if the insurance business aspects of the dispute are tangential to the main controversy. But in this case insurance disputes are at the heart of the controversies for, as the majority points out, the plaintiffs "cannot recover . . . without necessarily implicating the illegal nature of Prudential's insurance practices" and the plaintiffs' grievances, though arising out of the employment or its termination, "nevertheless implicate the legality of certain insurance practices." *Id.* at 12. Indeed, if the exception to the obligation to arbitrate employment controversies for disputes involving the insurance business is inapplicable here, it is difficult to understand when it ever would be applicable.

I respect the majority's point concerning the presumption in favor of arbitration and, as I have indicated, I am aware that in cases of doubt it is appropriate to order arbitration. But to me this case is fairly clear and the generalized policy in favor of arbitration cannot overcome the plain meaning of the Code.

I also point out that the New Jersey state courts would resolve this case differently. In *Young v. Prudential Ins. Co.*, 688 A.2d 1069 (N.J. Super. Ct. App. Div.), *certif. denied*, 694 A.2d 193 (N.J. 1997), the Superior Court of New Jersey, Appellate Division, construed the same Code provision involved here to permit an action in court in a similar case. In fact, *Young* found the district court opinion in this very case to be "compelling" and followed it. *Id.* at 1079. Accordingly, I have no doubt that the New Jersey

state courts will follow *Young* and not this case. *See Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (holding that "decisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy") (citation omitted). It thus appears that in New Jersey the determination of whether there will be arbitration in controversies of the nature involved here, even against the same employer, now will depend on whether a state or federal court makes the determination.

In sum, I conclude that the district court opinion at *In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 924 F. Supp. 627, 640-42 (D.N.J. 1996), is right on the mark as is the opinion of the state court in *Young*, 688 A.2d 1069. Thus, I would affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 19, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MDL No. 1061
Civ. No. 95-4704

IN RE: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS.

OPINION

FACTUAL BACKGROUND

This motion is part of a large group of cases against defendant Prudential Insurance Company of America ("Prudential") which have been transferred to this Court for coordinated pretrial proceedings under 28 U.S.C. § 1407 pursuant to the order of the Judicial Panel on Multidistrict Litigation. The majority of these cases involve allegations by current and former Prudential policyholders that the company engaged in various illegal sales practices. The cases at issue on this motion are part of a smaller subset of cases, in which certain former Prudential sales agents allege that Prudential took adverse employment actions against them because they refused to participate in these illegal practices. Plaintiffs Michael R. Weaver ("Weaver"), Herbert Schulte ("Schulte"), Rick A. Martin ("Martin"), Kenneth R. Young ("Young") and Michael D. Gordon ("Gordon") (collectively, for purposes of this motion, the "agents") assert such claims.

Appendix C

At some point in the course of each of the agents' employment at Prudential, they became eligible to sell insurance products which, at least in Prudential's view, constituted securities. Accordingly, each signed a Uniform Application for Securities Industry Registration or Transfer ("U-4").[1] Young signed two U-4s, the first in 1988 and the second in 1993 when, after his 1992 retirement, Prudential allegedly retained his services as an "agent emeritus." (Young Opp. Br. p. 3) Although the agents' U-4s differed in minor respects, for purposes of this motion they were essentially the same. For example, Young's 1988 U-4 read, in relevant part:

> 2. I hereby apply for registration with the organizations and states indicated in Item 10 as may be amended from time to time [*i.e.*, the NASD][2] and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and

1. Gordon has not contested Prudential's motion to compel arbitration. Accordingly, the terms of his U-4 are not at issue.

2. Each plaintiff's U-4 listed the National Association of Securities Dealers ("NASD") as an organization with which he was to register.

> limitations imposed by such states and organizations, subject to right of appeal as provided by law; . . .
>
> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Item 10 as may be amended from time to time.

Insofar as is relevant to this motion, Weaver's U-4 and Young's 1993 U-4 contained the same provisions. Martin and Schulte, on the other hand, signed an earlier version of the U-4 which differed slightly in two ways: (1) in paragraph 2, in addition to certifying that they agreed to abide by, comply with and adhere to the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the NASD, Martin and Schulte attested: "I . . . have read and understand" these provisions and rules; and (2) in paragraph 5, their U-4s do not contain the language "as may be amended from time to time" at the end of the sentence.[3]

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3. The Court finds this second difference insignificant. Under ordinary rules of grammar and syntax, the quoted phrase from the later version modifies the language immediately preceding it, *i.e.*, "as indicated in Item 10." In other words, the "as amended" language refers to the list of organizations with which the signing agent has registered, not to the rules and regulations of these organizations. This interpretation finds further support in the fact that a similar phrase, "registration with the organizations and states indicated in Item 10 as may be amended from time to time," appears in paragraph 2 of the later version. Thus, neither version specifically requires the agents to abide by the NASD arbitration rules "as amended;" however, such a specific provision was not necessary in light of the agents' clear agreement in paragraph 2 of the U-4 to comply with all NASD

(Cont'd)

Appendix C

Interpretation of the NASD arbitration provisions — and a determination of which provisions were in effect at various times — are central issues on this motion. Effective October 1, 1993, the NASD amended its Code in respects that are critical to this motion (the "1993 amendment"). Although each agent was terminated before the 1993 amendment took effect, they all filed their actions after that date.[4]

Two provisions of the NASD Code are chiefly relevant. Under its postamendment formulation, Part I Section 1 ("section 1") sets forth generally the matters *eligible* for arbitration:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the [NASD], or arising out of the employment or termination of employment of associated person(s) with any member,[5] with the exception of disputes involving the insurance business of any member which is also an insurance company:

(Cont'd)

rules and regulations "as amended." *See Wojcik v. Aetna Life Ins. and Annuity Co.*, 901 F. Supp. 1282, 1289 (N.D. Ill.), *clarified*, 916 F. Supp. 729 (N.D. Ill.). The reason paragraph 5 appears as a separate requirement is probably to alert agents who sign the U-4 that their claims may be subject to arbitration under NASD rules.

4. For purposes of the arbitration discussion in this Opinion, "agents" will refer to Schulte, Weaver, Young and Martin. As noted above, Gordon has not contested Prudential's motion to compel arbitration at this time.

5. The preamendment version did not contain the language "or arising out of the employment or termination of employment of associated person(s) with any member."

(1) between or among members;

(2) between or among members and associated persons;

(3) between or among members or associated persons and public customers, or others;[6] and

(4) between or among members, registered clearing agencies with which the [NASD] has entered into an agreement to utilize the [NASD] arbitration facilities and procedures, and participants, pledges, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

Part II Section 8 ("Section 8") defines which disputes *must* be arbitrated:

> (a) Any dispute, claim, or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member,[7] shall be arbitrated under this Code, at the instance of:

---

6. Subparts 2 and 3 were also amended in 1993. The pre-amended version contained only 3 subparts, the second of which read "between or among members and public customers, or others. . . ." Thus, the preamended version of Section 1 did not specifically authorize arbitration between members and "associated persons."

7. The preamendment version did not contain the language "or arising out of the employment or termination of employment of such associated person(s) with such member."

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and,

(3) a person associated with a member against a person associated with a member.

Even under its preamendment version, section 8 contemplated arbitration between members and persons associated with a member.

In addition, plaintiffs Gordon, Weaver and Schulte were, during their employment with Prudential, members of the United Food & Commercial Workers International Union (the "union").[8] Accordingly, their employment was governed by the terms of a collective bargaining agreement between Prudential and the union (the "CBA").[9] Pursuant to Labor Management Relations Act § 301, certain state law causes of action which they might otherwise be entitled to bring against Prudential may be preempted by the CBA.

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8. For purposes of the preemption discussion in this Opinion, "agents" will refer to Gordon, Schulte and Weaver.

9. Over the course of the various agents' employment at Prudential, various versions of the CBA governed. As none of the differences are germane to this dispute, this Court's references will be to a single CBA.

Appendix C

DISCUSSION

PRUDENTIAL'S MOTION TO COMPEL ARBITRATION

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-9 (1988), governs enforcement of arbitration agreements contained in U-4s. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Under 9 U.S.C. § 2, a written agreement to arbitrate in a contract evidencing a transaction involving commerce is "valid, irrevocable and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." Congress enacted the FAA in 1925 "to 'reverse centuries of judicial hostility to arbitration agreements.' " *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987), *quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, 94 S. Ct. 2449, 2453, 41 L. Ed. 2d 270 (1974). The statute accordingly "establishes a federal policy favoring arbitration," requiring that Courts "rigorously enforce agreements to arbitrate." *Id.* (citations omitted). The Courts have taken this directive seriously, holding that the intent of the FAA was to leave "no place for the exercise of discretion by the district court. . . ." where an agreement can be construed to require arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985).

On the other hand, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986), quoting *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S.

574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409 (1960). In other words, the FAA makes arbitration agreements "as enforceable as any contract, not more so." *Moore v. Interacciones Global, Inc.*, 1995 WL 33650, (S.D.N.Y.). *See also Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 801 (10th Cir. 1995) (Jenkins, J., concurring) (citations omitted) (expressing concern that Courts have overcompensated for hostility of Courts to arbitration in decades past and commenting: "It seems to me that the rule that doubts about the scope of arbitrable issues should be resolved in favor of arbitration, like other rules of construction, should be applied only as a last resort, after the court or trier of fact has considered extrinsic evidence of the parties' intent and found it inconclusive.").

To determine whether a party may compel arbitration, a Court "must determine: (1) whether there is an agreement to arbitrate; (2) whether the claims fall within the scope of that agreement; and (3) whether there has been a waiver of the right to arbitrate." *Wojcik*, 901 F. Supp. at 1285, citing *Gilmer*, 500 U.S. at 24-34, 111 S. Ct. at 1651-56; *Hall v. Metlife Resources/Div. of Metropolitan Life Ins. Co.*, 1995 WL 258061, *2 (S.D.N.Y.).

The agents first argue that they signed no valid agreement to arbitrate claims against Prudential. All four agents assert that Prudential is not a party to the U-4s they signed, and Martin and Young argue that their U-4s did not bind them at the time of the events from which this litigation arises. Second, the agents argue that the arbitration provisions do not apply to the claims at issue here because (a) the arbitration clauses did not apply to employment disputes before the 1993 amendment and cannot be retroactively applied; and (b) their claims are exempt from arbitration by virtue of the insurance business exception set forth in Section 1 of the NASD Code. Finally, Martin asserts that the

U-4 he signed is unenforceable as a contract of adhesion. The Court will address these arguments in turn.[10]

I. Applicability of the U-4s to the Parties

A. Prudential May Enforce the Arbitration Provisions Even Though it is Not Named as the "Firm" in the U-4s

The agents allege that Prudential is not a party to the U-4 arbitration provision and therefore cannot enforce it. That provision requires the agents "to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the [NASD]." The "firm" is identified in a separate section of each agent's U-4 as Pruco Securities Corp. ("Pruco"), Prudential's wholly-owned subsidiary. The agents claim Prudential cannot compel enforcement of an arbitration provision contained in an agreement to which it was never a party.

This argument fails for several reasons. First, the Court notes that each agent agreed to arbitrate disputes not only with his firm but with "a customer, or any other person," so long as the NASD rules require that dispute to be arbitrated. The agents have focused on the "my firm" language and failed to address the remainder of the provision. Clearly, Prudential is an "other person" whose disputes with its agents are covered by the current NASD

10. The agents also argue that, even if Prudential had a right to arbitrate their claims, it waived that right when it moved to transfer the agents' cases to this Court for pretrial proceedings. Given the Court's disposition of the motion, it need not address this argument. The Court also notes that, given the extensive briefing and complexity of issues raised on these motions, this Opinion will not specifically address each point the parties raise or each case they cite. The parties should rest assured, however, that the Court has considered them.

arbitration rules. Moreover, each agent's U-4 contained a separate provision requesting names of broker-dealers other than Pruco with which he would maintain registration. With the exception of Young's 1993 U-4, each of the agents attested that they would maintain concurrent registration with Prudential.

Prudential Ins. Co. of America v. Shammas, 865 F. Supp. 429 (W.D. Mich. 1993), is exactly on point. There, as here, the plaintiff signed a U-4 naming Pruco as "my firm" but naming Prudential as a broker-dealer with which he would maintain concurrent registration. *Id.* at 430. The Court noted that plaintiff's "act of registering with NASD was as part of his employment with Prudential" and held that "the context of his registration plus the language [providing for concurrent registration] make it clear that the representation concerning arbitration, paragraph 5 [of the U-4], applied to . . . Prudential." *Id.* at 430. Within this circuit, *Foley v. Presbyterian Ministers' Fund*, 1992 WL 63269, *2 (E.D. Pa.), rejected the plaintiff's argument that his U-4 did not apply to his non-signatory employer because there was "no suggestion that plaintiff had any occasion to seek registration as a securities dealer except as an aspect of his employment with [defendant]." *See also Pitter v. Prudential Life Ins. Co. of America*, 906 F. Supp. 130, 132 n.2 (E.D.N.Y. 1995) (without discussion, requiring plaintiff to arbitrate with Prudential although Pruco was named "firm" on U-4).

Kresock v. Bankers Trust Co., 21 F.3d 176, 178 (7th Cir. 1994), is distinguishable. In that case, the plaintiff worked for defendant Bankers Trust, which was one of two subsidiaries of Bankers Trust New York Corporation. The other was BT Securities Corporation. BT Securities was a NASD member; Bankers Trust was not. In 1989, the plaintiff had plans to transfer from Bankers Trust to BT Securities; accordingly, she signed a

U-4 which identified BT Securities as her "firm." When Bankers Trust terminated her in 1991, she had never transferred to or performed any work for BT Securities. The Court declined to enforce the U-4 arbitration provision against Bankers Trust because, as a mere co-subsidiary sharing a corporate parent with BT Securities, it was neither a NASD member, a person associated with a NASD member, a public customer or "other." *Id.* at 178. Here, by contrast, Prudential is a NASD member in its own right; its relationship to the "firm" named in the U-4s is that of parent-subsidiary; the agents' employment with Prudential was the sole reason for their signing the U-4s; and the agents specifically named Prudential as a broker-dealer with whom they would maintain concurrent registration.

B. Martin's Employment Agreement did not Supersede his Agreement to Arbitrate

Martin alleges that in 1988, some five years after he signed his U-4 in 1983, Prudential promoted him to District Agencies Manager and entered a standard employment agreement with him which explicitly stated: "This Agreement supersedes any previous agreement the Manager may have had with the Company." (Martin Opp. Br. pp. 6-7, 10-11) Martin contends that the employment agreement supersedes his U-4 and that, since the employment agreement did not contain an arbitration clause, Prudential may not compel arbitration of his claims. (*Id.* at pp. 7, 11)

O'Donnell v. First Investors Corp., 872 F. Supp. 1274 (S.D.N.Y. 1995), squarely rejected a very similar argument. In that case the plaintiff had, upon acceptance of employment with the defendant, signed both a standard employment agreement and a U-4. Three years later he received a promotion and, in connection therewith, signed a new employment agreement that

explicitly superseded the old. When the defendant terminated him he argued that, since he signed the U-4 as a condition to his initial employment agreement, the superseding employment agreement cancelled the U-4. The Court disagreed, holding that the U-4 "is not a contract with defendants but rather an application to qualify with various security exchanges. The U-4 is a separate contract, and as long as this contract is effective, the terms of the agreement must be followed, regardless of the fate of a separate, though related, agreement." *Id.* at 1277.

Here, too, even though Martin's employment agreement states that it "supersedes any previous agreement the Manager may have had *with the Company*" (emphasis added), the U-4 is not an agreement with Prudential and therefore remained in effect following Martin's promotion.

C. Prudential May Enforce Young's U-4

Young argues that Prudential cannot enforce the U-4 against him because (1) he never became subject to it because he never actually engaged in the sale of securities; and (2) he was no longer subject to the first U-4 he signed once Prudential terminated him and notified the NASD of this fact, and he never became subject to the second U-4 he signed because Prudential denies that it rehired him as an agent emeritus. (Young Opp. Br. pp. 6-7)

The Court in *Foley*, 1992 WL 63269 at *1, rejected Young's first argument when it held that the "undertakings contained in Form U-4 were contingent on executing the form, not on becoming a registered dealer." *See also Cherry v. Wertheim Schroder and Co.*, 868 F. Supp. 830, 835 (D.S.C. 1994) (signatory of U-4 obligated to arbitrate even though she failed to pass NASD examination); *Johnson v. Piper Jaffray, Inc.*, 530

N.W.2d 790, 798 (Minn. 1995) (declining to look "beyond [plaintiff]'s job title or job description" of bond trader and determining that plaintiff was a "person associated with a member" even though she never actually traded securities).

The Ninth Circuit rejected Young's second argument in *O'Neel v. National Ass'n of Securities Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982), in which the plaintiff argued that the agreement to arbitrate contained in his U-4 did not apply to a claim his former employer asserted against him nearly four years after he resigned from the NASD. The Court stated:

> It would seem strange indeed that with such a significant integrated method of dispute settlement one party could frustrate the purpose of the Exchange rules and the federal policy favoring arbitration by the mere expediency of resignation from the Exchange.

Id. at 806-07, *quoting Muh v. Newburger, Loeb & Co.*, 540 F.2d 970, 973 (9th Cir. 1976). *Accord*, *'Strappes Group, Inc. v. Siedle*, 1993 WL 443926, *5 (D. Mass.); *see also Le Roux v. Shearson Lehman Hutton, Inc.*, 160 A.D.2d 1091, 553 N.Y.S.2d 572 (3d Dept. 1990) (U-4 required financial consultant to arbitrate claim against former employer where plaintiff remained a person "associated with a member" by virtue of his subsequent employment in securities industry).

II. Applicability of Arbitration Clauses to Agents' Claims

A. Coverage of Employment Disputes

As set forth above, the 1993 amendment added language to sections 1 and 8 of the NASD which makes it clear that the

arbitration provisions currently cover employment disputes. In the legislative history to the proposal for the 1993 amendment, the NASD stated: "The NASD has taken the position that employment disputes are arbitrable under Section 8, but in order to clear up any ambiguity, it is proposing the changes . . . which parallel the NYSE rule language." Fed. Reg. Vol. 58, No. 138, pp. 39070, 39071 (July 21, 1993). Prudential argues that this legislative history proves that the provisions always applied to employment disputes and that, in any event, the 1993 amendment applies to the agents' claims because they filed them after its effective date. The agents argue that the 1993 amendment indicates that the provisions did not apply to employment disputes previously and that the amendment cannot be applied retroactively.

The agents urge the Court to adopt precedent from the Seventh Circuit. In *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1255 (7th Cir. 1993), decided before the amendment took effect, Judge Easterbrook held that "the NASD's Code does not authorize, and section 8 therefore does not require, the arbitration of an employment dispute between a member of the NASD and one of the member's registered representatives." Section 1 at that time read as follows:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the [NASD], with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (1) between or among members;
>
> (2) between or among members and public customers, or others; . . .

Appendix C

The Court focused on the language in section 1 following the colon, which defines the parties whose claims are subject to arbitration, and determined that members' representatives' claims are not subject to arbitration. The Court rejected the defendant's argument that the phrase "or others" in subpart (2) covered such claims, finding that "such a reading . . . would make all of the words after the colon surplus." *Id.* at 1255-56. The Court acknowledged that "the NASD's rules could be stretched to cover such disputes," *id.* at 1255, and that the NASD had suggested in its proposed amendment that it "believe[d] that its Code already covers employment disputes," *id.* at 1256, but concluded that "[a] change in the Code, rather than a strained interpretation of the current language, is the right way to proceed." *Id.* at 1257.

Kresock, 21 F.3d at 178, which the Seventh Circuit decided after the 1993 amendment's effective date, reaffirmed *Farrand* and went on to hold that the amendment did not apply retroactively. *Id.* at 179. In *Kresock*, as here, the plaintiff had signed a U-4 that bound her to amendments of the NASD rules. But, unlike here, the plaintiff in *Kresock* had filed her claims nearly a year before the effective date of the amendment. The Court pointed out that the SEC, in its August 31, 1993 order approving the amendment, provided for the effective date of October 1, 1993, and found that this was a strong indication against retroactivity. *Id.*

The Court rejected the defendant's argument that the plaintiff's agreement to be bound by amendments to the NASD Code mandated arbitration on the ground that "[t]he incentive created by such a result would be this: after commencement of litigation, an organization such as the NASD could simply amend its rules to force one or both parties to do something (like arbitrate) that one or both never agreed to do." *Id.* Thus, the fact that the

agents filed their cases after the effective date distinguishes this case from *Kresock* in a meaningful way; for a holding that U-4 signatories are bound to amendments taking effect before they file their cases would not create this opportunity for strategic rule changes.

A recent district court opinion within the Seventh Circuit examined *Kresock* and stated that it "appeared to be primarily concerned with the application of amendments to a situation in which a claim has already been filed." *Wojcik*, 901 F. Supp. at 1287. Accordingly, the *Wojcik* Court held, the 1993 amendment applies to plaintiffs whose U-4s require them to comply with NASD rules and regulations "as amended" and who file their claims after the effective date. *Id.* at 1288.[11]

This reasoning is persuasive, and harmonizes *Kresock* with the holdings of numerous other courts which have applied the 1993 amendment to cases filed before the amendment's effective date. In *Pitter*, 906 F. Supp. at 134 (citations omitted), the Eastern District of New York held that the 1993 amendment applied to a case filed in April 1994, stating:

> The 1993 amendments to the NASD Code deal, after all, only with the forum where employment claims will be heard. They do not alter the substantive rights conferred by Congress on employees. . . . In *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.

11. In a later opinion in the same case, the *Wojcik* court "ma[d]e clear that [its] earlier determination that [defendant] could compel arbitration under the terms of the NASD Code was based on the facts that some of the *conduct* that is the subject of the complaint took place after the effective date of the NASD amendment while [plaintiff] was employed with [defendant], *and* that [plaintiff] filed his complaint after that date." *Id.* at 1284 (emphasis added).

> Ct. 1483, 1502 [128 L. Ed. 2d 229] (1994), the Supreme Court stated that 'changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.' Thus, it is entirely appropriate to hold [plaintiff] to compliance with non-substantive rules that took effect almost six months before he filed his lawsuit.

The *Pitter* Court distinguished *Kresock* on the ground that the plaintiff there had not filed his claims until after the effective date of the amendment. *Id.* at 134 n.5.

In *Moore*, 1995 WL 33650, the Southern District of New York rejected the plaintiff's argument that the 1993 amendment so substantively changed the NASD Code that it could not be incorporated through the U-4's "as amended" clause. The Court distinguished contractual agreements to incorporate such amendments from "the very different issue of statutory retroactivity." *Id.* at *5. *See also Hall*, 1995 WL 258061 at *4, *citing Scher v. Equitable Life Assur. Soc. of the United States*, 866 F. Supp. 776, 777 (S.D.N.Y. 1994) ("it is the NASD Code in existence at the time an action is commenced that governs"); *but see F.N. Wolf & Co. v. Brothers*, 161 Misc.2d 98, 102, 613 N.Y.S.2d 319, 322 (Sup. Ct. 1994) (citations omitted) (without stating whether action commenced before or after effective date of amendment, holding that retroactivity "would reduce the arbitration agreement to a mere forum selection clause, overlooking the fact that by agreeing to arbitrate, parties forfeit important substantive rights to resort to a judicial forum to resolve their disputes and to appeal unfavorable results").

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This Court finds the *Farrand* and *Kresock* holdings to be inapposite to this case, in which the agents all signed written agreements to abide by the rules and regulations of the NASD Code, as amended, and brought their claims after the effective date of the 1993 amendment. Given the agents' explicit agreement to arbitrate under the NASD Code "as amended," the Court must look to the rules as they existed at the time the agents filed suit, and not before. On this ground alone, it is clear that the agents may not avoid arbitration on the ground that their disputes are employment-related.

Moreover, *Farrand* and *Kresock* have been widely criticized. Most notably, the Court in *Kidd v. Equitable Life Assur. Soc. of the United States*, 32 F.3d 516, 519 (11th Cir. 1994), as well as courts in numerous cases that have followed *Kidd*, held that the NASD Code always required arbitration of employment disputes and that the 1993 amendment was a mere clarification of that rule. The Eleventh Circuit pointed out that the *Farrand* holding creates a tension between sections 1 and 8 of the preamendment Code: whereas section 8 required the arbitration of disputes between members and "associated persons" such as employees, section 1 did not specifically authorize arbitration of disputes between members and associated persons. *Id.*[12] *Accord, F.N.*

12. The *Kidd* Court also found, 32 F.3d at 519-20, that the *Farrand* holding created tension between the NASD Code and the U-4 itself, pursuant to which signatories agreed to arbitrate any dispute, claim or controversy that may arise "*between me and my firm* . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." (emphasis supplied). The Court noted that its holding would avoid "the strange situation wherein Appellees signed U-4 forms promising to arbitrate any disputes with their employer required to be arbitrated by the NASD at a time when the NASD rules did not mandate arbitrate of employer-employee disputes." *Id.* The Court finds this reasoning unconvincing. The U-4 is a universal form, to be used for registration with a multitude of different bodies. Some of these, including the New York Stock Exchange, unequivocally required arbitration of employment disputes at the time the agents signed their U-4s.

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Wolf & Co. v. Bowles, 160 Misc.2d 752, 757, 610 N.Y.S.2d 757, 759 (Sup. Ct. 1994) ("*Farrand*'s interpretation, based on the principle that paragraph 3 of section 1 would be rendered surplusage if arbitration of the subject dispute were required, was at the cost of making surplusage of the portion of section 8 which, in paragraph 2, mandates arbitration when demanded by an associated person against a member").

The *Kidd* Court resolved this apparent conflict by reading the language following the colon in section 1 to modify only the insurance business exception clause that immediately preceded it, rather than the entire paragraph. Under this reading, parties were required to arbitrate "any dispute connected to an NASD member's business, except for disputes involving the insurance business of an NASD member that are (1) between NASD members or (2) between NASD members and public customers or others." *Kidd*, 32 F.3d at 519. *Accord, Moore,* 1995 WL 33650 at *4.

While this Court agrees that the *Farrand* reading creates an inconsistency between sections 1 and 8 of the NASD Code, it also hesitates to adopt the *Kidd* reading of section 1. Like the Court in *Pitter*, 906 F. Supp. at 135, this Court "has difficulty understanding what interest the NASD would have in qualifying the insurance business exception clause with the enumerated categories that follow." The Courts in *'Strappes*, 1993 WL 443926 at *4, and *Johnson*, 530 N.W.2d at 797, resolved the conflict by reading the phrase "or others" in section 1 to incorporate all the categories specifically identified in section 8, including "persons associated with members." This reading solves the problem with the "or others" language which the *Farrand* Court highlighted without requiring the somewhat strained interpretation of section 1 that *Kidd* advanced. While the Court need not specifically adopt

any interpretation of sections 1 and 8 in light of its holding that the 1993 amendment applies to the agents' claims, it will note that the *'Strappes/Johnson* reading appears to be the most logical.

Yet another approach courts have taken to this semantic conundrum is to label it an ambiguity and apply the presumption in favor of arbitration to resolve the issue. As noted in *Kidd*, 32 F.3d at 519 n. 6, the *Farrand* Court "acknowledged that it was not unreasonable to interpret the pre-amendment Code to require arbitration of employment disputes." Thus, the *Kidd* Court found, *Farrand*'s adoption of an alternative construction contravened well-established federal precedent that doubts regarding the scope of arbitrable issues are to be resolved in favor of arbitration. *Id.*, citing *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166 (5th Cir. 1979). *See also Armijo*, 72 F.3d at 798 ("to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved in favor of arbitrability"); *O'Donnell*, 872 F. Supp. at 1278 (rejecting *Farrand* and finding that *Kidd* "makes more sense given the liberal federal policy toward arbitration"); *Pitter*, 906 F. Supp. at 136; *Bowles*, 160 Misc.2d at 757, 610 N.Y.S.2d at 759-60.

This Court is not convinced that the presumption in favor of arbitrability would be powerful enough on its own to compel arbitration where the language of the provisions is so unclear. However, the *Kidd* opinion provided additional support for its holding that the preamendment Code contemplated arbitration of employment disputes, 32 F.3d at 520, to wit, (1) dicta from a District of Columbia Circuit case stating that "NASD rules mandate arbitration of employer-employee disputes, and did so, to the same extent as they do now, before the development of [the U-4]." *Association of Inv. Brokers v. Securities and Exchange*

Com'n, 676 F.2d 857, 861 (D.C. Cir. 1982) (Ginsburg, J.); (2) a 1987 NASD statement that employment disputes between members and their registered agents were arbitrable, 52 Fed. Reg. 9232 (1987); and (3) the NASD's statement that the purpose of its amendment was to clarify that employment disputes are arbitrable, 58 Fed. Reg. 45,932 (1993). As pointed out in *Pitter*, 906 F. Supp. at 137 (citing cases), agencies and exchanges have substantial authority to interpret their own rules and regulations. *See also Bowles,* 160 Misc.2d at 758, 610 N.Y.S.2d at 760 (citations omitted) (applying principle that courts should defer to administrative agency's interpretation of its own regulations unless "irrational or unreasonable" to NASD).

This position finds further support in numerous opinions that predate the 1993 amendment in which courts applied the NASD arbitration clause to employment disputes of various kinds. *See e.g., Association of Inv. Brokers*, 676 F.2d at 861; *Bender v. Smith Barney, Harris Upham & Co.*, 789 F. Supp. 155 (D.N.J. 1992); *Spellman v. Securities, Annuities and Ins. Servs., Inc.*, 8 Cal. App. 4th 452, 464, 10 Cal. Rptr. 2d 427, 435 (Cal. App. 2 Dist. 1992).

In sum, the Court finds ample indications that the preamendment NASD Code applied to employment disputes such as the agents' claims; however, the Court will simply hold that, since all the agents filed their claims after the effective date of the amendment, they are bound thereby and may not avoid the arbitration provisions simply because their disputes are employment-related. This does not end our analysis, however. The fact that the agents have asserted claims that are arbitrable under the terms of their U-4 does not mean that they must arbitrate them against Prudential. As an insurance company, Prudential is potentially subject to the "business of insurance" exception set forth in the NASD Code.

Appendix C

B. The Insurance Business Exception

Section 1 of the NASD Code excludes from its list of matters eligible for arbitration all "disputes involving the insurance business of any member which is also an insurance company." Although none of the parties were able to enlighten the Court as to the drafting history or reasoning behind this exception, presumably it has something to do with the lack of insurance industry expertise on the part of securities industry arbitrators. Certainly, it would stand to reason that the drafters of the NASD might have recognized that a category of its signatories belong to an industry which, although it sells some products with a securities component, operates otherwise in a separate sphere from the rest of the securities industry. Especially given the complex regulatory framework which governs the insurance industry, the exception makes a great deal of sense.

Numerous cases have found the insurance business exception inapplicable to personnel and various other employment related disputes. *See, e.g., Shammas*, 865 F. Supp. at 432 (plaintiff claimed national origin, race, religion and sex discrimination, plus retaliation for complaining about alleged discrimination); *Foley*, 1992 WL 63269 at *2 (plaintiff alleged his termination was unlawful under ADEA, ERISA and unspecified state law); *Wojcik*, 901 F. Supp. 1282 (plaintiff claimed defendants took various unlawful actions against him in retaliation for refusal to accept job change). Requiring arbitration of garden-variety employment disputes involving U-4 signatories makes sense because, as Prudential's counsel pointed out at oral argument, securities arbitrators have a wealth of experience resolving such disputes; accordingly, these courts properly declined to apply the exception.

From this authority, however, Prudential asks the Court to derive a rule that the insurance business exception can never apply where the plaintiff alleges an employment-related injury. A contrary rule, asserts Prudential, would allow any employee of an insurance company to avoid arbitration "simply by alleging the dispute involves consideration of the company's insurance business." (Prudential Reply Br. p. 16) Prudential's argument focuses too narrowly upon the injuries the agents allege, disregarding the scope and nature of the issues the trier of fact will have to analyze in determining whether or not to grant relief for those injuries.

The agents concede that garden-variety employment disputes do not implicate the insurance business exception. They claim, however, that the instant case is distinguishable from ordinary employment disputes on the ground that their claims are more intricately connected with the allegedly fraudulent and illegal character of Prudential's insurance business practices than are claims in ordinary employment disputes. This Court agrees — and would add that this case is also distinguishable from garden variety employment disputes in another important respect. The agents' claims are intertwined with dozens of putative class actions potentially involving hundreds of thousands of policyholders who have made allegations against Prudential that involve the same factual issues that the agents' claims raise. The resulting potential for inconsistent results and inefficiencies provided the impetus for the consolidation of all of these actions in this Court, and the same circumstances — while they obviously could no justify a reformation of a binding contract to arbitration claims—have also weighed into the Court's determination that these claims involve Prudential's insurance business and therefore belong in this Court and not in a separate arbitral forum. The Court does not share Prudential's concern that future disgruntled insurance employees will avoid arbitration simply by including allegations involving

their employers' insurance business; courts are perfectly capable of looking beyond the face of a complaint to determine whether or not the dispute really involves a defendant's insurance business.

The Court is aware that the few courts which have addressed the application of the insurance business exception to claims arising out of employment relationships appear to have rejected the agents' position; however, the Court finds each of these cases distinguishable under the unique circumstances of the instant case. To the extent they are not, the Court declines to follow them here. In *Young v. Prudential Ins.*, Docket No. SOM-L-907-95 at p. 4 (slip op.) (N.J. Super. Law Div. Oct. 19, 1995), the Court refused to apply the exception to a claim for discharge in retaliation for whistle blowing, finding that "the exception relating to insurance and the business of insurance . . . must of necessity relate to disputes about the practices of an insurance company raised between insurance companies themselves and not to the alleged retaliation visited on an employee who calls attention to his insurance company employer's alleged unlawful insurance practice."

The opinion provides few specifics about the retaliatory discharge claim — only that it involved the plaintiff's "whistleblowing about unlawful conduct of other Prudential employees." *Id.* at 2. Thus, it is not clear that the claim would have required the Court to engage in the comprehensive evaluation of Prudential's insurance practices that the agents' claims might require. Moreover, this Court finds no support in the text or history of the NASD Code for the *Young* Court's finding that the exception applies only to disputes between insurance companies themselves. Accordingly, the Court will decline to follow *Young* in this matter.

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In *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152, *3 n. 3 (E.D.Pa.), the Court refused to apply the exception where, although

> the plaintiff ma[de] some general allegations in the complaint that [defendant] is engaging in unlawful insurance practices, the basis of his claims stem from actions taken by the defendants against the plaintiff since he did not participate in their alleged scheme. Thus, whether or not the defendants actually engaged in any unlawful insurance practice is irrelevant to this dispute.

The *Trumbetta* opinion does not set forth the factual details of the plaintiff's claims in that case; however, the case appears to be distinguishable from the agents' claims here. In *Trumbetta*, the plaintiff had made "some general allegations in the complaint" that the defendant insurance company had engaged in "certain unlawful insurance practices" and that the defendants had taken adverse actions against him "since he did not participate in their alleged scheme." Id. at *3. However, the "thrust" of the *Trumbetta* complaint was "that the defendants harassed and persecuted [plaintiff] such that he lost business and th[u]s ultimately was constructively discharged." *Id.*

Accordingly, the *Trumbetta* Court found that "whether or not the defendants actually engaged in any unlawful insurance practices is irrelevant to this dispute." *Id.* Although it is not entirely clear from the opinion, it would seem that the plaintiff in *Trumbetta* could prove that illegal acts of harassment and persecution led to his constructive discharge without proving that defendants actually engaged in unlawful insurance practices; thus, the *Trumbetta* case implicated the business of insurance only indirectly, having to do

only with the defendants' motivation for what would be, if proven, independently unlawful acts.

Here, by contrast, Prudential discharged the agents in what would facially appear to be an entirely proper manner. Prudential's action becomes unlawful only if the agents can prove that it was taken in retaliation for the agents' refusal to cooperate with unlawful insurance practices, and only if the practices the agents refused to participate in were actually fraudulent or unlawful does Prudential's allegedly retaliatory motive become improper or unlawful.

Armijo, 72 F.3d 793, is also distinguishable from this case. In *Armijo*, the plaintiffs framed their claim as an ordinary Title VII claim for discrimination based upon national origin. *Id.* at 800 (emphasis added) ("the dispute *as framed by the Plaintiffs* is predicated on the civil-rights laws, not the insurance laws, and they are predicated on [defendant]'s role as an employer rather than as an insurer"). The only basis for applicability of the insurance business exception was the defendant's defense of the adverse employment actions it had taken against plaintiffs on the ground that plaintiffs had violated the insurance laws. Here, by contrast, plaintiffs' allegations of insurance business misconduct form the very center of their claims. Indeed, without the agents' allegations that Prudential engaged in improper insurance business practices, there would be no lawsuit. Plainly, such claims "involv[e] the insurance business of [a] member which is also an insurance company," and the NASD will not require a securities industry arbitrator to resolve it.

III. Enforceability of Martin's U-4

Martin argues that "the alleged arbitration agreement is one of adhesion, was entered into fraudulently and does not bind

Martin in any manner." (Martin Br. p. 3) He asserts that his agreement to submit to the jurisdiction of the organizations for which he applied for registration was "buried" at the end of one of many purported "employment forms" which Prudential presented for his immediate signature as a condition of employment. Martin acknowledges his express agreement, appearing in "fine print" (Martin Br. p. 6) at paragraph 5 of the U-4, "to arbitrate any dispute . . . that is required to be arbitrated" under NASD rules. However, he claims that neither of these provisions should bind him to arbitrate this dispute because, contrary to Prudential's own representation at the end of the U-4 that "the applicant will be familiar with the . . . rules and by-laws of the . . . self-regulatory organization with which this application is being filed, and the rules governing registered persons," Martin was never provided with copies of any of the rules or regulations with which he purportedly agreed to comply. (Martin Br. p. 5)

A somewhat similar argument has prevailed in the Ninth Circuit. *In Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 61, 133 L. Ed. 2d 24 (1995), as here, the plaintiffs alleged that

> when they signed the U-4 form, they were told only that they were applying to take a test, which was required for their employment by Prudential, and that they were simply directed to sign in the relevant place without being given an opportunity to read the forms. Arbitration was never mentioned, and plaintiffs were never given a copy of the NASD Manual.

The Court held that, under these circumstances, the plaintiffs had not knowingly agreed to waive their rights to sue in federal court under Title VII; it based its holding, however, on specific

language from the federal statute requiring a knowing agreement to waive such rights before a plaintiff can be compelled to arbitrate. *Id.* at 1304-05. The agents have pointed to no such statutory requirement of a knowing waiver of their rights; accordingly *Lai* is distinguishable from this case.

Moreover, *Lai* has been rather extensively criticized. *See Beauchamp v. Great West Life Assur. Co.*, 918 F. Supp. 1091, 1096 (E.D. Mich.) (holding that *Lai* misreads Title VII and "flies in the face of" *Gilmer* and basic contract law); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995) (citing cases); *Degaetano v. Smith Barney, Inc.*, 1996 WL 44226, *7 (S.D.N.Y.) (citing cases). And numerous other courts have rejected similar arguments. In *Bender*, 789 F. Supp. at 159, the Court found that the plaintiff failed to allege that defendant Smith Barney made a false or misleading statement "either as to the Form U-4 itself or as to any inducement to sign the form . . . [and] failed to present any legal support establishing that [her employer] had a duty to disclose or to explain the existence or scope of the Form U-4 arbitration clause." The *Bender* Court found that, since brokers have no legal duty to disclose or explain arbitration clauses to their customers, their duty to employees such as the plaintiff is "even less." *Id.* Finally, the *Bender* Court held, 789 F. Supp. at 159,

> [E]ven if Smith Barney had explained the scope of the arbitration clause to plaintiff, the end result would have been the same; the execution of a Form U- 4 is not unique to Smith Barney employees and it is not optional. It is an SEC industry-wide requirement, a prerequisite to registration with any securities firm. Thus, plaintiff could not have been fraudulently induced into signing this document or could not have

> detrimentally relied on any affirmative representations rendered by Smith Barney. . . . Smith Barney is bound by the terms of the Form U-4 to the same extent as plaintiff is bound.

See also Pitter, 906 F. Supp. at 140 (rejecting *Lai* and noting: "the fact that a U-4 form does not specifically identify employment claims — or any other types of claims — as among those to be arbitrated does not mean that a registrant has failed knowingly to enter into an arbitration agreement. Indeed, the lack of specificity only highlights the breadth of the agreement."); *Cherry*, 868 F. Supp. at 836 (absent "any allegation of fraud, coercion, or unfairness" Court rejects plaintiff's argument that unequal bargaining power voided the agreement); *Beauchamp*, 918 F. Supp. at 1098.

This Court is sympathetic to the views of those who believe that the arbitration provisions to which employees in the securities industry are required to submit as a condition of their employment are unfair. However, basic contract law and longstanding judicial precedent clearly preclude a holding that Martin's U-4 is a contract of adhesion.

The Court is intrigued, however, by Martin's argument that Prudential's failure to provide him with copies of the rules and regulations with which the U-4 obligated him to comply *despite its explicit written attestation that it had done so* precludes the company from demanding arbitration. This is a question which the courts do not appear to have addressed yet. The parties have not fully briefed the issue, and in light of the Court's holding on the insurance business exception it is unnecessary for this Court to explore it further; however, the Court highlights this as a potential ground for exploration.

Appendix C

PRUDENTIAL'S MOTION TO DISMISS ON SECTION 301 PREEMPTION GROUNDS

As set forth above, Gordon, Weaver and Schulte were union members during their employment with Prudential and, accordingly, governed by the terms of the CBA. Under Labor Management Relations Act ("LMRA") § 301,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). While the statute on its face simply provides for federal jurisdiction over controversies involving collective bargaining agreements, the preemptive force of section 301 has long been acknowledged. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403-06, 108 S. Ct. 1877, 1880-82, 100 L. Ed. 2d 410 (1988); *Berda v. CBS Inc.*, 881 F.2d 20, 22 (3d Cir. 1989), *cert. denied, CBS, Inc. v. Berda*, 493 U.S. 1062, 110 S. Ct. 879, 107 L. Ed. 2d 962 (1990). Essentially, the preemption doctrine that has developed provides that:

> if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is preempted and federal labor-law principles — necessarily uniform

> throughout the Nation — must be employed to resolve the dispute.

Lingle, 486 U.S. at 405-06, 108 S. Ct. at 1881. The "limited purpose" of the doctrine is to ensure "that a uniform law is applied in interpreting collective bargaining agreements," *Berda v. CBS Inc.*, 881 F.2d 20, 27 (3d Cir. 1989), and to enforce arbitration provisions in such agreements. *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 2077, 129 L. Ed. 2d 93 (1994).

Thus, the proper approach to a state law preemption question is to analyze each element of the state claim at issue and then to determine whether its resolution will require the Court to construe or interpret any terms or provisions of the applicable labor agreement. *See Lingle*, 486 U.S. at 407, 108 S. Ct. at 1882.[13] The fact that a labor agreement provides a remedy that the plaintiff could pursue as an alternative to state law claims does not mandate preemption. *See Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 229 (3d Cir. 1995) ("plaintiff may bring a state law tort action against an employer, even where he could have brought a similar claim based on a provision in his collective bargaining agreement, so long as the state claim does not require interpretation of the collective bargaining agreement"). At the same time, however,

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13. The Sixth Circuit has outlined a two-part test for determining preemption questions, asking first "whether proof of the state law claim requires interpretation of collective bargaining agreement terms" and second "whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law." *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994). Preemption is warranted under the Sixth Circuit test unless the claim (1) does not require contract interpretation *and* (2) does assert a right borne under state law. *Id.* Because this Court finds no support in the *Lingle* holding for the second portion of the Sixth Circuit test, and because no party has argued for its application to this case, we decline to adopt it.

> the fact that a particular provision of the [CBA] may not explicitly address the conduct underlying [the] complaint does not mean that resolution . . . does not require interpretation of the agreement. . . . The governmental nature of the collective-bargaining process demands a common law of the shop which implements and furnishes the context of the agreement although not expressed in it.

Douglas v. American Information Technologies Corp., 877 F.2d 565, 572 (7th Cir. 1989).

That resolution of a state law claim might require *consultation* of a collective bargaining agreement does not mandate preemption; a claim is preempted only if its resolution requires *interpretation or construction* of a collective bargaining agreement. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, n.8, 114 S. Ct. 2239, 2248 n. 8, 129 L. Ed. 2d 203 (1994) (citations omitted); *Livadas v. Bradshaw*, 512 U.S. 107, 14 S. Ct. 2068, 2078, 129 L. Ed. 2d 93 (1994) (citations omitted) ("when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished"); *Thomas v. LTV Corp.*, 39 F.3d 611, 620 (5th Cir. 1994); *Pelech v. Klaff-Joss, LP*, 828 F. Supp. 525, 531 (N.D. Ill. 1993) (citations omitted) (section 301 did not preempt claim where complaint frequently referred to but did not require interpretation of collective bargaining agreement terms).

The circuit courts have not yet reached a consensus on whether reliance upon terms of a collective bargaining agreement as a defense to plaintiff's claims creates grounds for preemption. *See Livadas*, 512 U.S. at __ n.18, 114 S. Ct. at 2078 n.18 (noting

disagreement among courts); *Schacht v. Caterpillar, Inc.*, 503 U.S. 926, 926-27, 112 S. Ct. 1306, 1306-07, 117 L. Ed. 2d 527 (1992) (White, J., dissenting) (same). Although a majority of federal circuit courts who have addressed the issue have held that a court should consider potential defenses in the section 301 preemption analysis, this Court finds that the question remains unresolved in the Third Circuit.

In *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 332 (3d Cir. 1993), the Court held that where either the plaintiff's claim or the defendant's defense relies on interpretation of a collective bargaining agreement, the Railway Labor Act ("RLA") preempts the claim. As the preemption standard under the RLA is "virtually identical" to that under the LMRA, *Hawaiian Airlines*, 512 U.S at __, 114 S. Ct. at 2247, *Capraro* provides a strong indication that the Third Circuit would consider issues raised in defense of state claims to be relevant to the preemption analysis.

However, in an earlier case arising directly under the LMRA, the Third Circuit arrived at a different conclusion. *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989). Relying on *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 2433, 96 L. Ed. 2d 318 (1987), the *Berda* Court held that "the fact that as part of a defense to a state law contract claim an employer might raise 'a federal question, even a § 301 question,' does not mean that the claim is preempted. The preemption of state law engendered by section 301 is only occasioned when the claim raised 'on the face of the complaint' substantially depends on interpretation of a collective bargaining agreement for its resolution." *Berda*, 881 F.2d at 23-24, *quoting Caterpillar*, 482 U.S. at 398-99, 107 S. Ct. at 2433.

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Berda should be viewed through the prism of the Supreme Court authority upon which it relies. *Caterpillar* was not a true section 301 preemption case; rather, the issue presented in that case was whether the doctrine of *complete preemption* applied to allow the defendants in the case to remove to federal court claims brought exclusively under state law.[14] Indeed, the *Caterpillar* Court specifically noted: "We intimate no view on the merits of . . . any of the [section 301] pre-emption arguments discussed above." *Caterpillar*, 482 U.S. at 398 n. 13, 107 S. Ct. at 2433 n.13. It also stated: "It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives." *Id. See also Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 770 (7th Cir. 1991) (interpreting *Caterpillar* to hold that claims might ultimately be preempted based on issues raised by defense). In light of this dicta in the Supreme Court case upon which *Berda* relies, as well as the Third Circuit's subsequent opinion in *Capraro*, this Court finds that Third Circuit precedent does not preclude an examination of potential defenses in the determination of whether section 301 preemption applies.

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14. The Caterpillar Court described the complete preemption doctrine as follows: "On occasion, the court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts and ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " 482 U.S. at 392, 107 S. Ct. at 2430, quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55 (1987). It held that consideration under the complete preemption doctrine of issues raised in an affirmative defense would be inappropriate because of the strictures against such consideration contained in the well-pleaded complaint rule. *Id.*, 482 U.S. at 398-99, 107 S. Ct. at 2433.

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The Seventh, Eighth and Ninth Circuits have clearly stated that defenses are relevant in the preemption analysis.[15] As noted above, the Seventh Circuit cited *Caterpillar* to support its determination that it was "free to resolve this [preemption] question by looking beyond the plaintiffs' complaint to the defenses [defendant] asserts." Smith, 943 F.2d at 770. *See also Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995).

Both the Ninth Circuit and the Eighth Circuit have cited *Lingle*, 486 U.S. at 407, 108 S. Ct. at 1882, in determining that potential defenses are relevant to the preemption analysis. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1524 (9th Cir. 1995); *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988). Each of these cases refers to the same passage from the *Lingle* opinion, where, in determining that the retaliatory discharge claims at issue did not require interpretation of the collective bargaining agreement, the *Lingle* Court first noted that none of the elements of the tort required such an interpretation and then stated:

> To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason

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15. The Sixth Circuit has taken the contrary position. In *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994), the Court held the preemption inquiry should focus on "the essence of the plaintiff's claim. . . . If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement." Thus, the Court held, a defendant's assertion of the contract as an affirmative defense cannot "turn an otherwise independent claim into a claim dependent on the labor contract." *Id.* (citation omitted). *See also O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) ("All the plaintiff has to allege is that an action was taken against him because of a motive impermissible under [state law]. It is irrelevant to the preemption question whether or not the employer can defend by showing it had the right under the collective bargaining agreement to do what it did.")

> for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective- bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement . . . : resolution of the state-law claim does not require construing the collective-bargaining agreement.

This clear indication that potential defenses are relevant to a section 301 preemption analysis, coming one year after the *Caterpillar* decision, provides a further indication that the Supreme Court did not intend that its *Caterpillar* holding should apply beyond the context of the complete preemption doctrine.

These decisions comport with the policies and purposes of section 301 preemption. As set forth above, *supra* pp. 643-44, the reason courts have ascribed such broad preemptive effect to section 301 is to enforce properly negotiated arbitration provisions and to ensure uniformity of interpretation regarding collective bargaining agreements. A court can frustrate this policy just as effectively by deciding an issue that arises in a defense as it can by deciding that same issue when it arises as an element of the plaintiff's proof. Accordingly, this Court will consider not only the issues raised by the agents' claims but also the issues raised by Prudential's defenses in determining whether section 301 preemption applies.

Prudential moves to preempt two categories of claims: (1) those of Gordon, Weaver and Schulte for retaliatory discharge; and (2) Weaver's claims for defamation and tortious interference with business expectancies.[16] Prudential contends these claims

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16. Schulte concedes that his Illinois and federal age discrimination claims are preempted.

will require the Court either to interpret specific provisions of the CBA or to examine relationships and practices governed by the CBA. For example, the company claims it terminated Schulte and Weaver for low sales production under the terms of its low production probation policy ("LPP policy"). Prudential asserts that the CBA supplied the authority under which it adopted the LPP policy, and that the CBA mandates grievance arbitration for disputes arising out of its application of the policy.

Similarly, Prudential states that it terminated Gordon when he failed to return to work after his disability period expired. Under the company's Service Disability Allowance Plan (the "disability plan"), expressly incorporated into the CBA in effect at the time, agents with less than five years' service are entitled to six months of disability leave benefits but face termination if they do not return to work at the end of the six-month period. Finally, Prudential defends Weaver's charges of defamation and tortious interference with business relations on the grounds that it owed its policyholders an obligation to disclose the information it imparted and that Weaver had no reasonable expectation of maintaining an independent business relationship with Prudential policyholders. Prudential contends that these relationships between the company, its agents and its policyholders are all governed by express and implied terms of the CBA.

I. Retaliatory Discharge

Under Illinois law, which applies to the claims of Weaver and Schulte, a retaliatory discharge complaint must allege (1) that the employer discharged the employee in retaliation for the employee's activities; and (2) that the discharge contravened a "clearly mandated public policy." *Carter Coal Co. v. Human Rights Com'n*, 261 Ill. App. 3d 1, 9, 198 Ill. Dec. 740, 746, 633

N.E.2d 202, 208 (App. 1994), *citing Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981). Under Kentucky law, upon which Gordon's claim is based, the tort of retaliatory discharge is similarly limited to "those situations where the evidence establishe[s] the employer was retaliating against the employee for exercising a right conferred by well-established legislative enactment or for refusing to violate the constitution or a statute." *Nelson Steel Corp. v. McDaniel*, 898 S.W.2d 66, 69 (Ky. 1995). According to Prudential, "[t]he central issue in a retaliatory discharge claim is whether the employer had an illicit motive in terminating the employee; an evaluation of the employer's stated reasons for termination is inseparable from this determination." (Prudential Br. p. 17)

In *Lingle, supra,* the Supreme Court determined that section 301 did not preempt an Illinois state law claim that alleged retaliatory discharge for filing a workers compensation claim. The defendant in that case claimed that the reason for the discharge was that the plaintiff's workers compensation claim contained false information, and that this constituted "just cause" for termination under the parties' collective bargaining agreement. The Supreme Court found that the state law claim was independent of the collective bargaining agreement because it turned on questions pertaining to "the conduct of the employee and the conduct and motivation of the employer," the determination of which did not require the Court to interpret any terms of the agreement. *Id.*, 486 U.S. at 407, 108 S. Ct. at 1882. *See also T.J. Gendron v. Chicago and North Western Transp. Co.*, 139 Ill.2d 422, 435, 151 Ill. Dec. 545, 551, 564 N.E.2d 1207, 1213 (1990) (citation omitted).

Prudential attempts to distinguish *Lingle.* It points out that it took adverse employment actions against Weaver, Schulte and

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Gordon under terms of the CBA that were much more specific than the "just cause" provision at issue in *Lingle*, and contends that, whereas the *Lingle* defendants simply referred to the "just cause" provision as a justification for terminating the plaintiff there, this Court must actually examine and interpret CBA terms to resolve the agents' retaliatory discharge claims.

Specifically, Prudential claims the Court will have to "evaluate" Prudential's claim that it terminated Weaver and Schulte for low sales production pursuant to the LPP policy — which, in turn, will require the Court to examine the amount of commissions these agents earned during the relevant period and to compare their performance to that of similarly situated agents who were not terminated. To decide Gordon's retaliatory discharge claim, Prudential argues, the Court will have to resolve a disagreement between Prudential and Gordon as to whether or not Prudential's disability plan authorized it to terminate Gordon. (Prudential Br. p. 20)

There are several potential problems with Prudential's arguments. First, it is far from clear that resolution of the retaliatory discharge claims will ultimately turn on the application of any specific CBA terms. It does not appear that either Illinois or Kentucky requires a retaliatory discharge plaintiff to show that the employer's *sole* motivation for taking action against the plaintiff was retaliatory. *See Szaflarski v. Lurie Co.*, 1991 WL 169356, *6 (N.D. Ill.); *First Property Mgt. Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993); *Willoughby v. GenCorp, Inc.*, 809 S.W.2d 858, 861 (Ky. App. 1990). Accordingly, if the agents can trace Prudential's actions against them even partially to improper retaliatory motives, the Court may be able to resolve the issue in their favor without even consulting the CBA. *See Thomas*, 39 F.3d at 621.

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Although Prudential contends that its defenses bring the CBA into play, this is not so apparent either. A court in this district recently declined to preempt a retaliatory discharge claim, holding: "Even if the employer's nonretaliatory explanation for the discharge depends on its interpretation of the collective bargaining agreement, '[s]o long as this interpretation was made in good faith and actually motivated . . . the [employer's] actions,' it constitutes a valid defense 'without regard to the correctness of the interpretation.' " *Kube v. New Penn Motor Express, Inc.*, 865 F. Supp. 221, 231 (D.N.J. 1994).[17] And, as an Illinois district court recently pointed out, courts in the Seventh Circuit have "consistently held that § 301 does not preempt retaliatory discharge cases" because "courts need not venture beyond a determination of whether an employer's termination decision was motivated by the employee's filing of a claim or other method of opposition." *Pelech*, 828 F. Supp. at 531 n. 7.

Prudential's position also assumes that the agents challenge its interpretation of the CBA. Clearly, if the parties all agree on the meaning of the relevant CBA provisions, the doctrine of preemption does not preclude the Court from deciding whether or not they constitute valid defenses. *Hawaiian Airlines, Inc.*, 512 U.S. at __, 114 S. Ct. at 2248 n.8; *Livadas*, 512 U.S. at __, 114 S. Ct. at 2078. The agents apparently do not challenge Prudential's authority under the CBA to adopt or implement the LPP policy, nor do they assert that Prudential has violated the terms of the CBA, the LPP policy or any other internal rule, procedure or practice adopted thereunder.[18] (See Weaver/Schulte Opp. Br. p. 11)

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17. Although the *Kube* plaintiff's claims arose under New Jersey law, the Court specifically found that the elements for a retaliatory discharge claim in New Jersey "closely mirror" those in Illinois. *Kube*, 865 F. Supp. at 230-31.

18. Although the Court need not examine the question in detail, we reject the argument, which Schulte and Weaver advance, that the LPP policy is not a

(Cont'd)

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Even to the extent that the agents attack the LPP policy directly for requiring production levels that can only be met through illegal sales practices, their claims do not appear to present an interpretation question. *See Sayres v. Lancaster Press, Inc.*, 1994 WL 71277 (E.D. Pa.) (no preemption where plaintiff and defendant agreed on intent and meaning of provision in collective bargaining agreement but disagreed as to whether provision violated state law).

Douglas, 877 F.2d at 565, is distinguishable. There, plaintiff sued her employer for intentional infliction of emotional distress, alleging that the defendant had harassed her by arbitrarily denying ordinary employees' rights such as vacation and sick time and by unduly scrutinizing her work. *Id.* at 567-68. The Court found that "even though the complaint facially stated a state-law tort claim, [plaintiff] was actually seeking relief for alleged breaches of the collective bargaining agreement." *Id.* at 568. Here, by contrast, Weaver and Schulte have asserted claims that the Court will likely decide without substantial reference to, much less interpretation of, the CBA.

Arguments like Prudential's have fared poorly in other courts as well — including the United States Supreme Court. In *Hawaiian Airlines*, 512 U.S. at __, 114 S. Ct. at 2251,[19] an

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(Cont'd)
collectively bargained agreement and as such cannot provide a basis for § 301 preemption. *See Riccio v. Prudential Ins. Co. of America*, 1992 WL 281159, *2 (D.N.J.) (where plaintiff's claim relied on agency agreement which was in turn subject to CBA, agency agreement was "within the purview of section 301"); *Thomas*, 39 F.3d at 617-18.

19. As noted *supra* p. 644, *Hawaiian Airlines* arose under the RLA rather than the LMRA, but the Supreme Court noted that the standards for preemption under the two statutes are "virtually identical." *Id.*, 512 U.S. at __, 114 S. Ct. at 2247.

employee claimed his employer discharged him after he refused to sign maintenance records because he believed the maintenance had not been performed properly. The employer argued that the claim should be preempted because it would require the Court to interpret a collective bargaining agreement provision setting forth circumstances under which employees were required to sign maintenance records. The Court found that "[a]lthough such a determination would be required with regard to [the employee's] separate allegation of discharge in violation of the agreement . . . [t]he state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer."[20]

Prudential cites *Doran v. Thermatex Corp.*, 1989 WL 163700 (N.D. Ohio), *Thomas*, 39 F.3d 611, and *Riccio*, 1992 WL 281159, cases in which courts have preempted retaliatory discharge claims. All are distinguishable. In *Doran*, the plaintiff's claims were preempted only because he himself raised an issue requiring interpretation of the collective bargaining agreement. *See Kube*, 865 F. Supp. at 230 (noting that *Doran* Court preempted claim "because it was based on the allegation that the employer had incorrectly interpreted the collective bargaining agreement.")

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20. Prudential overestimates the scope of the preemption doctrine when it argues that the Court should preempt Weaver's and Schulte's claims in order to forestall the possibility that a judgment for plaintiffs would nullify Prudential's "management right" under the CBA to establish and modify its LPP policy. (Prudential Br. p. 19) The Supreme Court rejected such an argument in *Hawaiian Airlines*, 512 U.S. at __, 114 S. Ct. at 2246, when it refused to preempt a discharged airline mechanic's state court action, stating: "Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistleblowing." *See also Miller v. AT & T Network Sys.*, 850 F.2d 543, 546 (9th Cir. 1988) (state law rights existing independent of labor contract rights are not preempted because a "contrary rule would permit unions and employers to exempt themselves from state labor standards"); *Thomas*, 39 F.3d at 620.

Similarly, the Court in *Thomas*, 39 F.3d at 620, explicitly based its preemption holding on the fact that the plaintiff himself had grounded his claim on an interpretation of the relevant labor agreement. And in *Riccio*, 1992 WL 281159 at *3, the Court simply held, without detailed explication, that it was "necessary to evaluate the terms of the CBA to determine whether [plaintiff] was wrongfully discharged." As set forth above, it does not appear that the agents' claims will require construction of the CBA.

For all of these reasons, the Court determines that section 301 does not mandate preemption of the agents' retaliatory discharge claims. The Court will also address Schulte's related claim for emotional distress arising out of his allegedly wrongful termination, for which Prudential requested preemption for the first time in its reply brief. As Prudential appears to concede, Schulte's claims for retaliatory discharge and emotional distress arise out of the same facts and implicate the CBA to the same degree. Accordingly, the Court will also deny Prudential's request for preemption of Weaver's emotional distress claim.

II. Defamation and Tortious Interference Claims

Weaver alleges that Prudential defamed him and interfered with his business relationships — both during and after his employment with Prudential — by informing individuals that Weaver was being investigated for unethical conduct, that he did not understand the insurance business, that he was inexperienced and that he "did not know what he was saying" when he told policyholders that Prudential had engaged in improper churning practices. (Weaver Resp. pp. 5, 13) Prudential argues that resolution of this claim requires interpretation of the CBA because the CBA establishes the contours of the relationships among Prudential, its agents and its policyholders, an understanding of

which is necessary to evaluate Prudential's qualified privilege defense to the defamation action and to assess Weaver's reasonable expectations for purposes of the tortious interference claims. The Court will examine Weaver's defamation and tortious interference claims in turn.

A. Tortious Interference

To set forth a claim under Illinois law for tortious interference with existing business relations, Weaver would have to show:

> (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages.

HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 131 Ill.2d 145, 154-55, 137 Ill. Dec. 19, 23, 545 N.E.2d 672, 676 (1989). To establish a cause of action for tortious interference with prospective business relations, he must show

> (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference.

Fellhauer v. City of Geneva, 142 Ill.2d 495, 511, 154 Ill. Dec. 649, 657, 568 N.E.2d 870, 878 (1991).

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Prudential claims the Court cannot resolve the first element of either claim without referring to the CBA. Specifically, it contends that express and implied provisions of the CBA set forth the terms of the three-way relationship among Prudential, Prudential's agents and Prudential's policyholders. Prudential contends that the CBA prohibits the formation of contracts between its current agents and its policyholders by protecting all proprietary information regarding its policyholders and their insurance contracts and by making it clear that these contracts are between Prudential and its customers, not between agents and customers. It also points to provisions in the CBA which prohibit Prudential agents from selling or servicing other companies' insurance products while employed at Prudential. Finally, it notes that departed Prudential agents are (1) required to turn in all written information they have received or generated regarding policyholders and their contracts and (2) precluded from soliciting Prudential policyholders for two years.

The Court agrees with Prudential that, in light of these express terms of the CBA, as well as the implied terms of the three-way relationship which may have developed thereunder, it will be impossible to determine the scope of Weaver's legitimate independent business relationships or reasonable business expectancies without construing the CBA.

In *Pelech*, 828 F. Supp. 525, the plaintiff asserted claims against three individuals for, among other things, tortious interference with her expectation of continued employment. The Court found that "[r]egardless of defendants' motivation for interfering with [plaintiff's] business expectancy . . . litigation of this claim will necessarily involve the court in interpreting provisions of the collective bargaining agreement. At the very least, as a threshold issue, we will have to assess whether or not

[plaintiff] had a valid business expectancy. . . ." *Id.* at 533. The existence and extent of Weaver's actual or potential contractual relationships with Prudential policyholders or other potential insurance customers are no less dependent on an interpretation of the CBA than was the case in *Pelech.* Accordingly, Weaver's tortious interference claims are preempted and the Court will dismiss them.

Ordinarily, dismissals on grounds of preemption are with prejudice. Here, however, Weaver has asserted that the CBA ceased to apply to him when he left Prudential's employ and that at least a portion of his claims arose after his termination. In response to this argument, Prudential cites *Merk v. Jewel Cos., Inc.*, 848 F.2d 761, 765 (7th Cir. 1987), for the proposition that persons "covered by a collective bargaining agreement — even those no longer working — must exhaust their union remedies before filing suit." Although this response does not satisfactorily resolve the extent of the CBA's applicability to Weaver after his termination, Weaver was unable to cite any authority to delineate the CBA's post-termination reach — nor did he specify the extent to which his claims arose after his termination. Accordingly, the Court will dismiss his tortious interference claims, but without prejudice.[21]

B. Defamation

Prudential argues that the Court will have to construe the CBA in order to evaluate Prudential's qualified privilege defense to Weaver's defamation claim. In *Kuwik v. Starmark Star Marketing and Admin., Inc.*, 156 Ill.2d 16, 27, 188 Ill. Dec. 765, 770, 619 N.E.2d 129, 134 (1993), the Illinois Supreme Court

21. The Court notes, however, that Weaver's pleadings on these claims would appear vulnerable to other dispositive motions from Prudential as well.

adopted the approach taken by the Restatement (Second) of Torts in determining whether a conditional privilege exists. To establish qualified privilege under this test, Prudential must show the Court that it made its allegedly defamatory statements on one of three types of "privileged occasion," defined as

> (1) situations in which some interest of the person who publishes the defamatory matter is involved
>
> (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved
>
> (3) situations in which a recognized interest of the public is concerned.

Id., 156 Ill.2d at 29, 188 Ill. Dec. at 771, 619 N.E.2d at 135 (citation omitted).

Prudential claims it disclosed the alleged defamatory information to protect its own interests in maintaining relationships between itself and its policyholders. Prudential cites the same CBA sections it cites in defense of Weaver's tortious interference claim, *e.g.*, provisions allegedly making clear that Prudential's policyholders were to be regarded as Prudential's customers and not Weaver's, prohibitions against Weaver's use of customer information for any purposes other than selling Prudential products, and the provision barring solicitation of Prudential customers for two years following his termination.

To show that a statement is conditionally privileged because it protects the publisher's interest, the defendant must show that the circumstances under which it was made would "induce a

correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, *and* (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." *Id.* (emphasis supplied), *quoting* Restatement (Second) of Torts § 594 (1977). Even assuming that the information Prudential allegedly imparted to its policyholders about Weaver affected the interests it cites, this Court fails to see how the policyholders' knowledge of the information could possibly have been of service to Prudential in protecting those interests. Accordingly, Weaver's claims for defamation are not preempted.[22]

In *Pelech*, 828 F. Supp. at 531, the plaintiff sued for sex discrimination, retaliatory discharge, and related claims, including a claim that defendants defamed her when "they accused her of theft and then published these accusations, along with allegations that Pelech was involved in illegal drug trafficking and an illicit affair with a married co-worker, to her fellow employees and tenants of the building where she worked." The Court found that evaluating the claim under Illinois law,

> in light of plaintiff's allegations and defendants' defenses, simply involves a determination of (1) whether Pelech did, or did not, steal a co-worker's

22. The Court also notes, although Prudential does not raise the issue, that the alleged statements were not made under circumstances giving rise to a conditional privilege for protection of the recipient's interest, either. To show that, Prudential would have had to show that the circumstances would "induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the recipient or a third person, and (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter." *Id.*, *quoting* Restatement (Second) of Torts § 595 (1977). Prudential has not alleged that it had a legal duty to disclose the alleged defamatory material to its policyholders.

> calculator, (2) whether defendants did, or did not, publish statements that Pelech was engaged in drug trafficking, (3) whether the latter statements are true, and (4) whether defendants made the alleged statements with malice. Nothing in such an evaluation requires us to look to the [CBA], let alone interpret it.

Id. at 531. Although the Court noted that interpretation of a labor agreement might become necessary "where a defendant-employer claims qualified privilege, thus necessitating a review of the [CBA]'s terms to determine whether the disputed communications fell within the scope of defendant's duties," *id.* at 531 n. 8, in this case the Court has found that the alleged defamatory statements could not have fallen within the scope of Prudential's duties or the legitimate protection of its interests.

Moreover, as the *Pelech* Court noted, qualified privilege serves in large part to enhance the plaintiff's burden of proof under Illinois defamation law, requiring a showing of malice rather than simple negligence; accordingly, since the plaintiff in that case had alleged malice, the Court held that even if the defendants had asserted the qualified privilege as a defense it would have made no difference to the Court's determination that the defamation claim was not preempted. *Id. See also Evans v. Keystone Consol. Indus.*, 884 F. Supp. 1209, 1217 (C.D. Ill. 1995) (noting in preemption context that plaintiff had "conceded" the qualified privilege issue as well as "pled around it by claiming . . . actual malice"). Weaver, too, has alleged that Prudential acted with malice and not merely negligently. Accordingly, even if Prudential's qualified privilege defense did require this Court to consult the CBA, it would not provide grounds for preemption.

Other courts have declined to preempt claims for defamation. In *Mulligan v. United Parcel Service, Inc.*, 1995 WL 695097

(E.D. Pa.), in which a plaintiff sued for discharge in retaliation for filing a workers compensation claim as well as defamation and emotional distress arising out of the same event, the Court granted summary judgment for the defendant on the defamation claim on the ground of qualified privilege but did not preempt the claim on that ground.

The cases Prudential cites are distinguishable. In *Kozlowsky v. K-Mart Corp.*, 1990 WL 90537 (D.N.J.) (Wolin, J.), this Court preempted a plaintiff's claim that his supervisor and fellow employees had defamed him during grievance proceedings, at an unemployment hearing and in other contexts. The statements at issue consisted of allegedly false allegations that the plaintiff had violated a certain company policy. According to the defendant, the policy was set forth in the CBA; according to the plaintiff, it did not exist. *Id.* at *3. The Court therefore held that it could not "determine the falsity of the statements at issue without inquiring into the existence of a company policy" and that, although this inquiry "might very well begin outside the CBA, the Court remains convinced that all avenues of inquiry would ultimately lead to the CBA." *Id.* at * 3-*4. Here, by contrast, the truth or falsity of the allegedly defamatory statements has nothing to do with the CBA.

Similarly, in *Hurst v. Consolidated Freightways Corp. of Delaware*, 1990 WL 43934 (M.D. Pa.), the defendant employer had discharged the plaintiff for failing a drug test. Plaintiff alleged that the test had been improperly administered in his case and sued for, among other things, defamation. The Court held that "the determination of whether the statements [the employer] made were defamatory requires an interpretation of the [CBA] and the Testing Procedure." *Id.* at *14. In other words, whether the defendant's statements regarding the plaintiff's termination were or were not defamatory depended upon the Court's determination

of whether or not the testing procedure used complied with the procedures set forth in the relevant CBA. *See also Stallard v. B-Line Sys., Inc.*, 799 F. Supp. 924, 926 (S.D. Ill. 1992) (defamation claim preempted where offending statements involved allegations that plaintiff had violated rules adopted pursuant to collective bargaining agreement).

Both *DeCoe*, 32 F.3d 212, and *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), involved allegations of defamatory statements made in the context of procedures or proceedings specifically authorized or mandated by collective bargaining agreements. In *DeCoe*, the plaintiff alleged that co-workers defamed him by bringing unfounded sexual harassment charges against him with political motives. The Court found that the plaintiff could not establish essential elements of his claim without substantial reference to provisions in the collective bargaining agreement regarding sexual harassment procedures because his claim, essentially, was that his co-workers had "exceeded the scope of CBA-imposed rights and duties, in their attempts to prosecute sexual harassment allegations." *Id.* at 216.

Similarly, in *Johnson*, the plaintiff alleged that co-workers defamed him by falsely reporting that he had slashed the tires of a fellow employee during business hours in the workplace parking lot. Since the allegedly false report was made as part of the employer's investigation under collective bargaining agreement provisions, the Court preempted the plaintiff's claims insofar as they arose out of statements made within the company. *Johnson*, 876 F.2d at 624. It did not, however, preempt the plaintiff's claim against the victim of the tire-slashing episode for statements to his insurance company. *Id.* at 624-25.

In this case, the alleged defamatory statements were not even arguably made as part of any procedure or proceeding carried

out pursuant to the CBA. Prudential does not claim that any provision specifically authorized or required it to inform its policyholders that Weaver was being investigated for ethical violations or to share with its policyholders its views on Weaver's knowledge, competence or job performance.

Furillo v. Dana Corp. Parish Div., 866 F. Supp. 842 (E.D. Pa. 1994), has little relevance to this case because it involved allegedly defamatory statements uttered during a grievance hearing. Courts have been quick to preempt state defamation claims based upon statements made during such proceedings to avoid reexamining issues already addressed by the arbitrator. *See id.* at 852; *Kozlowsky,* 1990 WL 90537 at *4.

Accordingly, the Court finds that Weaver's defamation claim is not preempted by section 301 and will allow the claim to proceed on the merits.

CONCLUSION

For the foregoing reasons, the Court will deny Prudential's motion to compel arbitration and stay these proceedings. It will grant Prudential's motion to dismiss, without prejudice, Weaver's claims for tortious interference with business relations on the ground that section 301 preempts them, but will deny Prudential's motion to dismiss Weaver's defamation claim, Schulte's claim for emotional distress, and the retaliatory discharge claims of Weaver, Schulte and Gordon.

An appropriate Order is attached.

Dated: April 19, 1996

s/ Alfred M. Wolin, U.S.D.J.
ALFRED M. WOLIN, U.S.D.J.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MDL NO. 1061
CIV. NO. 95-4704

IN RE: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER

In accordance with the Court's Opinion filed herewith,

It is on this 19th day of April, 1996

ORDERED that the motion of The Prudential Insurance Company of America ("Prudential"), to compel arbitration and stay these proceedings, is denied; and it is further

ORDERED that Prudential's motion to dismiss plaintiff Michael R. Weaver's ("Weaver") claims for tortious interference with business relations is granted, without prejudice; and it is further

ORDERED that Prudential's motion to dismiss Weaver's defamation claim is denied; and it is further

ORDERED that Prudential's motion to dismiss plaintiff Herbert Schulte's ("Schulte") claim for emotional distress is denied; and it is further

Appendix C

ORDERED that Prudential's motion to dismiss the retaliatory discharge claims of plaintiffs Weaver, Schulte and Michael D. Gordon, is denied; and it is further

ORDERED that the age discrimination claim of Schulte is dismissed with prejudice.

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

Supreme Court, U.S.
FILED
JUN 29 1998
CLERK

No. 97-1911

In The

Supreme Court of the United States

October Term, 1997

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

MICHAEL R. WEAVER, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The questions presented for review by petitioners do not accurately reflect the issues before the Third Circuit or the Third Circuit's analysis and holding. Accordingly, Prudential presents the following properly framed question:

> Should the Supreme Court grant a writ of certiorari to review the Third Circuit's decision that petitioners Rick A. Martin and Michael R. Weaver, who did not contest on appeal that they knowingly agreed to arbitrate employment disputes with Prudential, must arbitrate their employment related claims against Prudential because their claims do not fall within the "insurance business" exception to the NASD Code of Arbitration Procedure?

LIST OF ALL PARTIES AND PUTATIVE PARTIES

The Petition does not accurately list the parties who are properly before this Court. Only the following are properly parties before this Court:

Rick A. Martin, Plaintiff/Petitioner and Appellee Below.

Michael R. Weaver, Plaintiff/Petitioner and Appellee Below.

The Prudential Insurance Company of America, Defendant/Respondent and Appellant Below.

The following petitioners are not properly before this Court because they were not parties to the appeal decided by the Third Circuit:

Eugene Kroll, Plaintiff/Petitioner;

Carol Hales, Plaintiff/Petitioner;

Anthony Ybarra, Plaintiff/Petitioner;

Lori Anderson, Plaintiff/Petitioner;

Rebecca Montero, Plaintiff/Petitioner;

Wilmer Sigwarth, Plaintiff/Petitioner;

Steven Demarais, Plaintiff/Petitioner;

Theodore Willenbring, Plaintiff/Petitioner;

Darrell Dunn, Plaintiff/Petitioner;

Greg Knutson, Plaintiff/Petitioner;

Donald Hales, Plaintiff/Petitioner;

Earl Schulenburg, Plaintiff/Petitioner;

Anthony Bodway, Plaintiff/Petitioner; and

G. Annette Nantz, Plaintiff/Petitioner.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Prudential Insurance Company of America ("Prudential") is a mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's nonwholly owned subsidiaries:

745 Property Investments

Prudential Mortgage Asset Corporation II

Prudential of America Life Insurance Company (Canada)

Preferred Coastal Realty, Inc.

Bache & Co. S.A. de C.V. (Mexico)

Lapine Holding Company

Lapine Development Corporation

Lapine Technology Corporation

Prudential Securities (Brazil) LTDA

Prudential-Bache International (Hong Kong) Ltd.

Prudential Bache Futures (Hong Kong) Limited

Prudential Bache Nominees (Hong Kong) Limited

Prudential Bache Securities (Hong Kong) Limited

Prudential Bache Finance (Hong Kong) Limited

PAMA (Indonesia) Limited

P.T. PAMA Ventura Indonesia

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Respondent The Prudential Insurance Company of America ("Prudential") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by the petitioners, who are all former Prudential employees but most of whom were not parties to the proceedings in the United States Court of Appeals for the Third Circuit.

PRELIMINARY STATEMENT

There is no reason for the Supreme Court to accept this petition for review on a writ of certiorari. The Third Circuit's decision involves nothing more than the application of the familiar principle of federal arbitration law that

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (*quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

In this case, the Third Circuit was asked to decide whether wrongful discharge and other claims asserted by former insurance sales representatives of Prudential were arbitrable as a result of the execution by the representatives of a version of the Uniform Application for Securities Industry Registration of Transfer ("Form U-4"), which incorporated by reference the NASD Code of Arbitration Procedure ("NASD Code"). Specifically, the question was whether the "insurance business" exception in the NASD Code should be construed so broadly as to render non-arbitrable petitioners' employment claims. Having determined that it could not "say with positive assurance" that the Form U-

4 contract language indicated a clear intent not to arbitrate such disputes, the Third Circuit reached the unsurprising conclusion that under such circumstances "a presumption in favor of arbitration applies."

No federal court decision (other than the district court opinion reversed by the Third Circuit here) has ever held otherwise. The two cases petitioners claim to be inconsistent with the Third Circuit's decision in fact addressed wholly separate issues. *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), concerned arbitrability of employment disputes prior to the 1993 amendments to the NASD Code (the amendments explicitly state that employment disputes are arbitrable). *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), focused on whether plaintiffs in that case had knowingly waived their rights under the provisions of Title VII to sue in federal court when they executed Form U-4s. Neither case discusses the "insurance business" exception in the NASD Code. Moreover, petitioners' arguments based on the actual holdings of *Farrand* and *Lai* were never raised before the Third Circuit. They were presented to the district court, which expressly rejected them. Having prevailed in the district court on their "insurance business" exception argument, however, the plaintiffs chose not to present these other points to the Third Circuit on appeal. Having declined to raise these issues below for tactical reasons, they may not resurrect these arguments before this Court.

Finally, fourteen of the petitioners have no right to proceed before this Court. Only two of the sixteen listed petitioners, Michael R. Weaver and Rick A. Martin, were parties to the Third Circuit proceedings. The others have similar, but factually slightly different cases, which were dismissed in favor of NASD arbitration by the district court in reliance on the Third Circuit

decision. These fourteen additional "petitioners" were not parties to the appeal below, did not seek to intervene in those proceedings, and have not appealed the dismissal of their cases to the Third Circuit (if such an appeal were even permissible prior to the conclusion of the arbitration). It is unclear why they have been added to the Petition, except perhaps to make this matter appear more complex and significant than it really is. What is clear is that these individuals have no right whatsoever to petition this Court.[1]

In short, the decision below was not entered in conflict with those of any other United States Court of Appeals. It simply applied principles of federal law, well established by this Court on numerous occasions, to the facts of the *Martin* and *Weaver* cases and those of three other agents who were parties to the appeal below and chose not to join the Petition. There are no compelling reasons to grant the Petition. It should be denied.

STATEMENT OF THE CASE

The statement of the case in the Petition does not provide a full or accurate description of the proceedings or decisions below, or the different (or even non-existent) role of the various petitioners in those proceedings. Therefore, pursuant to Supreme Court Rule 15.2, Prudential submits this statement of the case to provide a correct and accurate description of the prior proceedings and to correct misstatements of fact and law in the Petition that bear on what issues properly would be before the Court if certiorari were granted.

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1. These petitioners are Eugene Kroll, Carol Hales, Anthony Ybarra, Lori Anderson, Rebecca Montero, Wilmer Sigwarth, Steven Demarais, Theodore Willenbring, Darrell Dunn, Greg Knutson, Donald Hales, Earl Schulenburg, Anthony Bodway and G. Annette Nantz. The first thirteen are represented by Fred L. Neff, the counsel of record for petitioners. For ease of reference, all are referred to herein as the "Neff petitioners."

A. The Form U-4 Arbitration Agreement

The relevant facts are not in dispute. As a condition of employment each of Prudential's sales representatives, including the petitioners, executed a Uniform Application for Securities Industry Registration or Transfer Form U-4 agreement ("Form U-4") agreeing to arbitrate any disputes with Prudential pursuant to the National Association of Securities Dealers Code of Arbitration Procedure (the "NASD Code").[2] Although there are minor variations between some of the petitioners' Form U-4s, each petitioner agreed to comply with the most current version of the NASD's rules and regulations, including the arbitration provisions of the NASD Code. In particular, each petitioner agreed to:

> arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the . . . [NASD] as may be amended from time to time.

and

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the . . . [NASD] as they

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2. Some of the facts in this section are derived from the Third Circuit's opinion and order, which is attached as Appendix B to the Petition and reported as *In re The Prudential Insurance Company of America Sales Practices Litigation All Agent Actions*, 133 F.3d 225 (3d Cir. 1998). The Third Circuit's opinion is referred to herein in the form "App. B at __," and the Federal Reporter cite is also given. The Third Circuit's finding that the agents executed Form U-4s as a condition of employment is at page 8a of Appendix B and 133 F.3d at 228.

> are and may be adopted, changed or amended from time to time.

(App. B at 7a, 133 F.3d at 228.)

The Form U-4 agreement to arbitrate thus incorporates by reference the NASD Code. When the Code was adopted in 1968, it only provided for arbitration of securities-related disputes. The Code was amended in 1980, however, to include "any dispute, claim or controversy arising out of or in connection with the business of an NASD member" whether or not securities-related. Securities Exchange Act of 1934 Release No. 16860, May 30, 1980, 1980 SEC LEXIS 1375, at *2. The purpose was "to provide *investors* with a simple and inexpensive procedure for the resolution of controversies with brokerage firms." 44 Fed. Reg. No. 245, 75,255 (Dec. 19, 1979) (emphasis added). The NASD recognized that this expansion in the scope of arbitrable disputes could overwhelm the NASD arbitration system with customer claims about their insurance policies:

> [T]he number of *insurance-only* claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are *intrinsically insurance*, that is, matters with respect to which the [NASD] does not believe it should mandate arbitration.

Id. (emphasis added). Accordingly, as part of the amendment the NASD excluded from arbitration "disputes involving the insurance business of any member which is also an insurance company." *Id.*

Although the NASD always considered employment-related disputes to be subject to arbitration, the original NASD Code

did not expressly say so. The NASD amended the Code, effective October 1, 1993, "to clarify" (the NASD's term) that disputes "arising out of the employment or termination of employment of [an] associated person" — including those employed by insurance companies — are subject to binding arbitration. 58 Fed. Reg. No. 138, 39070 (July 21, 1993). Rule 10101 of the NASD Code provides for the arbitration of:

> any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company[.]

Thus, when the former agent appellees filed their lawsuits against Prudential in 1995, the NASD Code expressly stated that any claims arising out of their employment or its termination were subject to arbitration. All of petitioners' claims fall within this provision. (*See* App. B at 13a-15a, 133 F.3d at 231.) Prudential asserts that it properly treated and terminated each of the petitioners who were before the Third Circuit, while these petitioners allege they were mistreated or terminated for complaining about or refusing to participate in what they describe as improper sales practices. (*See* App. B at 13a-14a, 133 F.3d at 231.) Resolution of their claims requires an assessment of their job performance and the reasons for termination.

B. District Court Proceedings

The petitioners' cases were transferred to the United States District Court for the District of New Jersey for consolidated pre-trial proceedings as part of a pending multidistrict

proceeding that also includes individual and class policyholder actions. *In re The Prudential Insurance Company of America Sales Practices Litigation*, MDL No. 1061, Master Docket No. 95-4704 (AMW). Following transfer, Prudential moved to compel petitioners Rick A. Martin and Michael R. Weaver and former agents Michael D. Gordon, Herbert Schulte and Kenneth R. Young to arbitrate their claims pursuant to Section 3 of the Federal Arbitration Act.[3] The former agents opposed the motion, arguing that their employment disputes were not arbitrable despite the plain language of their Form U-4 agreements and the NASD Code.

On April 19, 1996, the district court, by the Honorable Alfred M. Wolin, issued its opinion and order on Prudential's motion.[4] Judge Wolin analyzed in detail the panoply of arguments raised by the former agents. He first held that Prudential could enforce the plaintiffs' Form U-4 arbitration agreements, even though the agents listed Pruco Securities Corp. ("Pruco"), Prudential's wholly-owned limited broker-dealer subsidiary, rather than Prudential as their "firm" for purposes of NASD registration. (App. C at 34a-36a, 924 F. Supp. at 634-35.) The court found that the former agents had agreed to arbitrate disputes not only with their listed "firm" but also with "a customer, or any other person." (App. C at 34a-35a, 924 F. Supp. at 634.) "Clearly, Prudential is an 'other person' whose disputes with its agents are covered by the current NASD

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3. Only Martin and Weaver are petitioners herein. Gordon did not contest Prudential's motion to compel arbitration, the district court did not address the terms of his Form U-4 agreement, and his Form U-4 agreement was not at issue on the appeal to the Third Circuit. Schulte and Young were appellees at the circuit court level, but have not joined in the Petition.

4. The district court's opinion and order are attached as Appendix C to the Petition. "App. C at __" refers to the April 19, 1996 opinion, which is reported at *In re The Prudential Insurance Company of America Sales Practices Litigation*, 924 F. Supp. 627 (D.N.J. 1996).

arbitration rules." (*Id.*) The district court further held that Prudential was entitled to enforce the Form U-4 arbitration provisions because the Form U-4s indicated the agents would maintain an NASD registration with Prudential and because the agents executed the Form U-4s solely in connection with their Prudential employment. (App. C at 36a, 924 F. Supp. at 635.)

The district court then found that the present version of the NASD Code plainly provides for arbitration of employment disputes, emphasizing that the 1993 amendments added language "which makes it clear that the arbitration provisions currently cover employment disputes," and that each of the agents had explicitly agreed in their Form U-4s to abide by the terms of the NASD Code *as amended.* (App. C at 38a-39a, 43a, 924 F. Supp. at 636, 638.) Since the agents filed suit after the effective date of the 1993 amendment, there could be no doubt that their employment disputes fell within the scope of the Code's arbitration mandate. (App. C at 43a, 924 F. Supp. at 638.)[5] Thus the district court distinguished the Seventh Circuit's opinion in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), holding that,

> since all the agents filed their claims after the effective date of the amendment, they are bound thereby and may not avoid the arbitration provisions simply because their disputes are employment related.

(App. C at 46a, 924 F. Supp. at 639.) None of the agents appealed from this ruling.

The district court also rejected an argument advanced by petitioner Martin, based on *Prudential Insurance Company of*

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5. The district court noted that it found "ample indications that the preamendment NASD Code applied to employment disputes such as the agents' claims." (App. C at 46a, 924 F. Supp. at 639.)

America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), that his Form U-4 agreement to arbitrate was a "contract of adhesion" and thus unenforceable. (App. C at 51a-54a, 924 F. Supp. at 642-43.) "[B]asic contact law and longstanding judicial precedent clearly preclude a holding that Martin's U-4 is a contract of adhesion." (App. C at 54a, 924 F. Supp. at 643.) None of the agents appealed from this ruling, either.[6]

Despite concluding that the agents' employment related disputes with Prudential were arbitrable pursuant to the NASD Code, the district court nevertheless proceeded to rule that they need not arbitrate their claims against Prudential. Contrary to the reasoning and holding of every other federal court to address the issue, the district court decided that the agents' claims involved Prudential's insurance business, and thus fell within the NASD Code's exception for "disputes involving the insurance business of any member which is also an insurance company." (App. C at 47a-51a, 924 F. Supp. at 640-42.) The district court conjectured, without support from the Code's drafting history, that the insurance exception was adopted because securities arbitrators lack the expertise to resolve insurance-related issues. (App. C at 47a, 924 F. Supp. at 640.) The court also mischaracterized the agents' employment claims as primarily requiring an evaluation of Prudential's insurance sales practices, affording undue weight to certain common allegations between the employment claims and the policyholder claims in the MDL proceeding. (*Id.*)

6. The district court evaluated and rejected a number of other arguments offered by different agents. The court ruled that Martin's employment agreement with Prudential did not supersede his earlier executed Form U-4 because the Form U-4 is not a contract with Prudential, but rather with the securities exchanges. (App. C at 36a-37a, 924 F. Supp. at 635.) Judge Wolin also held that Young could not avoid his obligation to arbitrate by resigning or terminating his employment, or by claiming he had never sold securities. (App. C at 37a-38a, 924 F. Supp. at 636.)

C. The Third Circuit Reversal

Prudential appealed Judge Wolin's decision to the Third Circuit. Since Prudential had prevailed on all but one of the issues before the district court, it raised only that issue on appeal:

> Having held that the appellees had knowingly agreed to arbitrate employment-related disputes with Prudential, did the district court err in holding that appellees did not have to arbitrate their pending employment-related claims because they fall within the 'insurance business' exception to the NASD Code of Arbitration Procedure?

This was the only issue before the Third Circuit. The appellees did not cross-appeal from any of Judge Wolin's rulings against them, with two limited and irrelevant exceptions.[7]

The Third Circuit reversed the order of the district court to the extent it denied Prudential's motion compelling arbitration and remanded the cases to the district court for further proceedings. (App. B at 20a-21a, 133 F.3d at 235.) The Court of Appeals held that consistent Supreme Court precedent concerning the proper construction of arbitration agreements required that petitioners Martin and Weaver arbitrate their employment disputes with Prudential. An opinion was filed and an order was entered on January 7, 1998.

To determine the question of the applicability of the insurance business exception to employment-related claims, the

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7. Appellee Kenneth Young cross-appealed two rulings to the Third Circuit. Young contended that he was not an "associated person" within the meaning of the NASD Code and that Prudential had waived its right to compel arbitration. The Third Circuit rejected Young's contentions. (App. B at 10a n.7, 133 F.3d at 229 n.7.) Young did not join the Petition.

Third Circuit first sought to ascertain the intent of the parties from the language of their Form U-4 agreements to arbitrate and the language and drafting history of the NASD Code, which the Form U-4s incorporate. The Form U-4 unambiguously provides that the parties agree to arbitrate disputes, claims, and controversies required to be arbitrated under the NASD Code. The circuit court then found from the "plain language" of the NASD Code that there can be "no question that the parties intended to arbitrate any dispute 'arising out of the employment or termination of employment.' " (App. B at 14a-15a, 133 F.3d at 232.) The panel stated that the NASD intended even employment disputes involving public policy issues to be arbitrated. (App. B at 16a, 133 F.3d at 233.)

The circuit court also noted that "the Code carves out an exception where the dispute involves the 'insurance business of any member.' " (App. B at 15a, 133 F.3d at 232.) However, the court found the scope of that provision to be ambiguous:

> Less clear, however, is the coverage of this exception, as several ambiguities immediately arise in the clause's interpretation. For example, it is not clear whether the business of insurance exception applies to employment related disputes, to disputes in connection with a member's business, or to both. More importantly, neither the Code nor NASD by-laws defines what is meant by the "insurance business" and the intended scope of its coverage.

(App. B at 15a, 133 F.3d at 232.)

As the Third Circuit noted,

> the NASD did not comment as to the potential interplay between the employment clause and the

> insurance business exception so as to illuminate the intended scope of arbitrable disputes in this context.

(App. B at 16a, 133 F.3d at 233.) The Court stressed the NASD's clear intention that employment disputes be arbitrated, and contrasted that fact with the NASD's statements that the "insurance business" exception applies only to "insurance-only" or "intrinsically insurance" claims:

> As a result, we are left with an unanswered question that is at the heart of this case — namely, whether employment disputes that implicate a member's insurance business fall under the insurance business exception. On the one hand, it is clear, from both the language of the text and its history, that employment disputes were unequivocally intended to be arbitrated. This is so even if the employment claim raises policy matters well beyond the narrow legal issue of contract breach or ordinary employment torts. These would include, for instance, discrimination based on age, sex, or race. *See* 58 Fed. Reg. at 39,071.
>
> On the other hand, the NASD has expressed a clear and unequivocal intent not to arbitrate "insurance-only" or "intrinsically insurance" claims. The contours of an "insurance-only" or "intrinsically insurance" claim are too amorphous to define with precision in the present factual context, especially where it is the exception to a broad arbitration provision. We can easily imagine scenarios, such as the one before us, where a claimant, in order to recover on normally arbitrable disputes, would require the arbitrator to decide insurance issues. Thus, it would be difficult to unambiguously announce, on the basis of

> the NASD Code and its drafting history, whether the parties intended that these sorts of controversies are "intrinsically insurance" without any further indication of the meaning of the phrase.

(App. B at 16a-17a, 133 F.3d at 233.)

Faced with this ambiguity, the Third Circuit did exactly as this Court has instructed in numerous opinions. With no guidance as to the meaning of the phrases "insurance-only" or "intrinsically insurance," the Third Circuit adhered to the presumption in favor of arbitration, and declined to expand the exception in the absence of a clear indication of the parties' purpose and the intended scope of coverage:

> We ultimately cannot say with positive assurance that the language of Form U-4 and the NASD Code, as well as their drafting histories, indicate the parties' desire not to arbitrate employment disputes that require the resolution of an insurance business issue. There is only one clear expression of intent here —that employment disputes are subject to arbitration while "intrinsically insurance" claims are not. Because this court cannot say with certainty what is meant by "intrinsically insurance" claims, and whether it embraces employment disputes, our mandate is clear: a presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties. Thus, we will reverse the district court's ruling that the insurance business exception exempted the plaintiffs' claims from arbitration in this case.

(App. B at 19a, 133 F.3d at 234.)

After receiving the decision, on January 12, 1998, Prudential's counsel of record advised the Third Circuit that its

opinion, while accurate with respect to all the facts pertinent to the issues on the appeal, did not reflect that Prudential ceased to be a member of the NASD on May 22, 1996. The facts relevant to the Third Circuit appeal and this Petition, however, remained unchanged. Prudential was a member of the NASD when Weaver, Martin and the other agent appellees executed their Form U-4s and when Prudential moved to compel them to arbitrate their disputes with Prudential. Pruco had always been and remains an NASD member. The company's current membership status did not alter the Third Circuit's or the district court's legal analysis, which focused on whether the parties intended to arbitrate their disputes at the time the former agents executed their Form U-4s. Prudential was always an intended beneficiary of the Form U-4 agreements with the NASD. (App. B at 10a-12a, 133 F.3d at 229-30.)

Weaver, Martin, Young and Gordon subsequently requested a rehearing or rehearing *in banc*. They made no claim in that rehearing request that Prudential's NASD membership status in 1996 affected in any way their obligations to arbitrate their claims against Prudential (nor did they raise the issue in the district court). Nor did any of the other petitioners before this Court seek to intervene on that (or any other) basis before the Third Circuit. On February 23, 1998, the Third Circuit denied both the request for rehearing and the request for rehearing *in banc*. The Third Circuit chose not to amend its decision in any respect in response to the January 12 letter from Prudential's counsel or the matters raised in appellees' request.[8] Only the dissenting judge on the original panel is identified as having thought rehearing appropriate. (App. A at 2a). The Petition for a Writ of Certiorari followed.

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8. The February 23, 1998 opinion denying the request for rehearing and rehearing *in banc* is attached as Appendix A to the Petition.

REASONS FOR DENYING THE PETITION

I.

THE THIRD CIRCUIT CORRECTLY RULED THAT WEAVER'S AND MARTIN'S CLAIMS DO NOT FALL WITHIN THE INSURANCE BUSINESS EXCEPTION.

The Third Circuit's decision is a soundly reasoned application of basic principles governing federal arbitration law, which have been enunciated in an unbroken series of decisions from this Court. Petitioners offer no compelling reason for this Court to exercise its discretion to review the decision on a writ of certiorari. As described above, the panel closely analyzed the language and history of the NASD Code and concluded that the Code provides no clear indication of intent as to "whether employment disputes that implicate a member's insurance business fall under the insurance business exception." (App. B at 16a-17a, 133 F.3d at 233.) Without a clear expression of intent, the Third Circuit declined to "grope for a rule that would resolve the ambiguity." (App. B at 18a, 133 F.3d at 234.)

Instead, the Court of Appeals simply applied this Court's presumption in favor of arbitration to resolve the doubts in construction against the parties resisting arbitration. (App. B at 14a-18a, 133 F.3d at 232-34.)

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (*quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83

(1960)). Arbitration must be compelled unless the party opposing it presents "forceful evidence of a purpose to exclude the claim." *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960); *see also Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 338 (7th Cir. 1984).

Most importantly,

> any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

> [W]hen a court interprets . . . provisions in an agreement covered by the FAA, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Volt Info. Sciences, Inc. v. Board of Trustees of Stanford Univ.*, 489 U.S. 468, 475-76 (1989). The duty to construe arbitration agreements liberally in favor of arbitration applies to the interpretation of agency rules and regulations, such as the NASD Code, that provide for the arbitrability of disputes. *See Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 798 (10th Cir. 1995).

Just as this Court has mandated, the Third Circuit properly resolved its "doubts concerning the scope" of the "insurance

business" exception in favor of arbitration. A writ of certiorari is not warranted.

II.

THE THIRD CIRCUIT'S DECISION IS IN ACCORD WITH EVERY OTHER FEDERAL COURT TO HAVE CONSIDERED THE APPLICATION OF THE INSURANCE BUSINESS EXCEPTION TO EMPLOYMENT DISPUTES.

The Third Circuit's decision was hardly unique. Contrary to the petitioners' argument, every other federal court to address this issue, including two other Courts of Appeals, have reached the identical conclusion.

In *Armijo v. Prudential Insurance Company of America*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit applied the presumption in favor of arbitration in this context. Three former Prudential sales representatives, all of whom had executed Form U-4s, sued the company under state and federal law for allegedly discriminatory treatment. 72 F.3d at 795-96. The plaintiffs were actually terminated, Prudential explained, because they had engaged in illegal insurance sales practices. *Id.* at 800. Prudential moved to compel arbitration pursuant to the plaintiffs' Form U-4 agreements. *Id.* at 795-96. The plaintiffs used Prudential's defense of their terminations to claim that their complaint fell within the insurance business exception. *See id.* at 800.

The Tenth Circuit rejected the plaintiffs' argument. "Our obligation to construe arbitration clauses broadly compels us to construe this [insurance] exception to the arbitration clause narrowly." *Id.* Employment-related claims, even when asserted against an insurance company, are "predicated on [the insurer's] role as an employer rather than as an insurer." *Id.* The rights of

a discharged insurance company employee are never "predicated" on laws or obligations pertaining to the transfer of risk of the insurer-insured relationship, or that otherwise regulate the "business of insurance." A broader interpretation of the insurance exception would render illusory the plaintiffs' agreement in their Form U-4s to arbitrate employment disputes. *Id.*

The Eleventh Circuit, the only other federal appeals court to have addressed the application of the insurance business exception to employment related claims, is also in accord with the decision below and with *Armijo. Kidd v. Equitable Life Assurance Soc'y of the U.S.*, 32 F.3d 516 (11th Cir. 1994), *aff'd after remand*, 119 F.3d 11 (11th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 626 (1997). After analyzing the language of the NASD Code and its amendments, the Eleventh Circuit found that "Equitable's personnel practices do not constitute a dispute over its 'insurance business.' " *Id.* at 519 n.5. "If the NASD did not mandate arbitration of the employer-employee disputes" of its insurance company members and their employees, the panel reasoned, "there would be no reason to require Appellees to sign U-4 forms promising to arbitrate such disputes." *Id.* at 520.

Every federal district court that has addressed the insurance business exception in the context of employment claims (with the exception of the district court below) has resolved doubts in favor of arbitration and found the insurance business exception not to apply. Many of these cases involved putative whistleblower claims concerning the same allegedly improper sales practices as the petitioners allege led to their dismissals. The district courts in these cases recognized that terminated employees are not entitled to avoid an arbitral forum simply because their retaliation claims relate to purported misconduct directed at policyholders. "That the facts underlying the

Plaintiff's claims may involve allegations of insurance practices, does not bring Plaintiff's claims within the insurance exception." *Battle v. Prudential Ins. Co. of Am.*, 973 F. Supp. 861, 869 (D. Minn. 1997).

> Breach of an employment contract, wrongful termination, and failure to pay wages are paradigm employment concerns, no matter how much insurance Prudential may sell or how it may sell it.

Jankauskas v. Prudential Ins. Co. of Am., 1997 WL 241143, at *2 (E.D. Pa. May 6, 1997); *see also Voith v. Metropolitan Life Ins. Co.*, No. 4:CV-94-0364, slip op. at 11-12 (M.D. Pa., Dec. 6, 1994) (insurance business exception not applicable to defamation claim even though plaintiff argued that the claim was based on MetLife's alleged unlawful insurance practices); *Young v. Metropolitan Life Ins. Co.*, No. 94-3274, slip op. at 1 n.1 (E.D. Pa. Sept. 12, 1994) (insurance business exception not applicable to plaintiff's claim that he was wrongfully discharged after reporting on MetLife's alleged fraudulent insurance practices).[9]

In the face of this consistent precedent — which goes wholly unmentioned in the Petition — petitioners try to manufacture a

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9. *See also, e.g., Goforth v. Prudential Ins. Co. of Am.*, No. SA-97-CA-1126, slip op. at 5 (W.D. Tex. Jan. 23, 1998); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550, 557-58 (S.D.N.Y. 1997); *Neary v. Prudential Ins. Co. of Am.*, 1997 WL 114789, at *3 (D. Conn. Feb. 24, 1997); *Vitone v. Metropolitan Life Ins. Co.*, 943 F. Supp. 192, 198-99 (D.R.I. 1996), *recons. denied*, 954 F. Supp. 37 (D.R.I. 1997); *Weinstein v. Equitable Life Assurance Soc'y of the U.S.*, 1996 WL 557321, at **2-3 (E.D. Pa. Sept. 26, 1996); *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282, 1291-92 (N.D. Ill. 1995), *order clarified by* 916 F. Supp. 729 (N.D. Ill. 1996); *Trumbetta v. Metropolitan Life Ins. Co.*, 1994 WL 481152, at *2 (E.D. Pa. Sept. 1, 1994); *Prudential Ins. Co. of Am. v. Shammas*, 865 F. Supp. 429, 432-33 (W.D. Mich. 1993); *Foley v. Presbyterian Ministers' Fund*, 1992 WL 63269, at *2 (E.D. Pa. Mar. 19, 1992).

split in the circuits by citing decisions of the Seventh Circuit in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993) and the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995). (*See* Petition at 7.) In fact, there is no conflict at all. Neither *Farrand* nor *Lai* discuss the insurance business exception. Nor does either case hold that employment disputes are not arbitrable (as the Petition claims). (Petition at 12.) *Farrand* holds that employees who brought claims prior to the effective date of the 1993 amendments to the NASD Code are not bound to arbitrate their employment related disputes. *Lai* holds that where a plaintiff had not knowingly waived her rights to sue in federal court under Title VII, she could not be compelled to arbitrate such claims.

In fact, the district court found both decisions inapplicable to the facts of Weaver's and Martin's cases. (*See* App. C at 38a-46a, 51a-54a; 924 F. Supp. at 636-39, 642-43.) The *Farrand* decision only applies to claims filed before the effective date of the 1993 amendments to the NASD Code. Claims filed after the effective date are plainly arbitrable. *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282, 1288-89 (N.D. Ill. 1995), *order clarified by* 916 F. Supp. 729 (N.D. Ill. 1996). All of the petitioners here filed their claims after the 1993 amendments. For this reason, Judge Wolin found *Farrand* inapplicable. "Given the agents' explicit agreement to arbitrate under the NASD Code 'as amended,' the Court must look to the rules as they existed at the time the agents filed suit, and not before." (App. C at 43a, 924 F. Supp. at 638.)

The district court similarly found *Lai* irrelevant. The agents pointed to no statutory requirement of a knowing waiver, as required by *Lai*. Moreover, the district court noted that "*Lai* has been rather extensively criticized," and concluded that "basic contract law and longstanding judicial precedent clearly preclude

a holding that Martin's U-4 is a contract of adhesion." (App. C at 53a-54a, 924 F. Supp. at 642-43.) This Court has ruled that Form U-4 agreements to arbitrate employment discrimination claims, which are a condition of employment in the securities industry, will be upheld and enforced " 'save upon such grounds as exist at law or in equity for the revocation of any contract.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991). Voluntary execution of an arbitration agreement, even when it is a condition of employment, simply does not equate to duress or coercion sufficient to invalidate the arbitration agreement, any more than it would suffice to invalidate an employment agreement. *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091, 1098 (E.D. Mich. 1996).[10]

The Petitioners also attempt to mislead this Court when they assert that had "their cases remained in the respective courts and circuits" in which they were brought, "instead of being consolidated pursuant to the rules for multi-district litigation, many of these cases would be proceeding to a jury trial." (Petition at 8, 15, 16-17.) Fifteen of the sixteen petitioners filed suit in Minnesota, Kentucky or Missouri. The petitioners point to no authority anywhere in the Eighth or Sixth Circuits to support the proposition that the law there differs from that announced by the Third Circuit below. In fact, both the District

10. *Lai* has been rejected throughout the other federal courts as contrary to this Court's decision in *Gilmer*, the strong public policy behind the FAA, the legislative history of Title VII, and fundamental principles of contract law. *See, e.g., Seus v. John Nuveen & Co.*, __ F.3d __, 1998 WL 294020, at *8 n.2 (3d Cir. June 8, 1998); *Beauchamp*, 918 F. Supp. at 1095-98; *Battle v. Prudential Ins. Co. of Am.*, 973 F. Supp. 861, 864-67 (D. Minn. 1997); *Rice v. Brown Bros. Harriman & Co.*, 1997 WL 129396, at *4 (S.D.N.Y. Mar. 21, 1997); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1473-75 (N.D. Ill. 1997); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995); *Hall v. MetLife Resources*, 1995 WL 258061, at **3-4 (S.D.N.Y. May 3, 1995).

of Minnesota (where thirteen of the petitioners filed) and the Western District of Kentucky (where Martin's case was filed) have held that the NASD Code requires arbitration of employment disputes.[11] Although the petitioners rely on *Farrand* as support for a different result in the Seventh Circuit, in point of fact the District Court for the Northern District of Illinois in *Wojcik* has made clear that *Farrand* does not apply to post-1993 amendment claims. 901 F. Supp. at 1286-89. The Northern District of Illinois has also criticized and refused to follow *Lai*. *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1474-75 (N.D. Ill. 1997). The petitioners would be in no different positions had their cases never been transferred to the MDL proceedings.

III.

THE PETITIONERS MAY NOT RAISE ISSUES HERE NOT RAISED BEFORE THE COURT OF APPEALS.

Since *Farrand* and *Lai* do not discuss the sole issue that was before the Third Circuit — the application of the "insurance business" exception to employment claims — petitioners may not raise with this Court the issues that actually were addressed in *Farrand* and *Lai*. Petitioners' attempt to do so is particularly

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11. In *Battle*, 973 F. Supp. at 867-68 (D. Minn. 1997), the District Court for Minnesota found that a former Prudential agent was required to arbitrate his employment claims against Prudential, expressly rejecting the reasoning of *Farrand*. In *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996), the District of Minnesota strongly criticized the *Lai* decision and declined to follow it. Likewise, the United States District Court for the Western District of Kentucky recently compelled arbitration of Title VII claims, expressly rejecting the plaintiff's contention that the agreement was unconscionable because it could require her to pay one half of the arbitration costs, implicitly rejecting the reasoning of *Lai*. *Walker v. MDM Serv. Corp.*, 1998 WL 141904, at *4 (W.D. Ky. Feb. 5, 1998).

inappropriate because Martin relied on the *Farrand* and *Lai* decisions before the district court, but chose not to cross-appeal Judge Wolin's adverse rulings on those issues to the Third Circuit. In a section of the agents' brief explaining the holdings of the district court, the agents acknowledged that Judge Wolin had squarely rejected the *Farrand* and *Lai* arguments. This was the only time *Farrand* or *Lai* were mentioned in the Third Circuit briefing.

This Court has repeatedly held that absent compelling circumstances, issues not raised in the lower courts will not be examined for the first time on appeal to this Court. "Where issues are neither raised before nor considered [by the court below], this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).[12] This stringent policy protects the integrity of the certiorari process.

> The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system.

Taylor v. Freeland & Kronz, 503 U.S. 638, 646 (1992). No compelling circumstances are present here that would justify an exception to the Court's time-honored procedures. Petitioners' attempt to thwart the appellate system should be denied.

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12. *See also, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Brown v. Socialist Workers' '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 104-05 (1982); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

IV.

THE NEFF PETITIONERS HAVE NO RIGHT TO SEEK CERTIORARI.

Only petitioners Martin and Weaver, as parties to the proceedings below, are entitled to appeal the Third Circuit's decision and petition this Court for a writ of certiorari. The other fourteen petitioners are not properly before this Court and raise factual assertions that are not relevant to the cases actually on appeal.

The lawsuits filed by the Neff petitioners had not been transferred to the MDL at the time of Prudential's original motion to compel arbitration, and thus were not the subject of that motion. Those transfers occurred during the pendency of the motion before the district court and the proceedings in the Third Circuit. The district court stayed the proceedings in these cases, including motions to compel arbitration, until the Third Circuit reached a decision. The Neff petitioners did not seek reconsideration of, or appeal from, this stay order. Nor did they seek to intervene before the Third Circuit.

After the Third Circuit ruled, the district court dismissed the cases brought by the Neff petitioners in favor of NASD arbitration. None of the Neff petitioners moved for reconsideration on the merits before the district court or moved to alter or amend these judgments based upon their views of the particular facts of their cases and the purported impact of Prudential's NASD status. *Cf.* Fed. R. Civ. P. 59(e). Nor did any of the Neff petitioners appeal Judge Wolin's dismissal orders. Indeed, the Federal Arbitration Act provides that a party compelled to arbitration may not appeal that decision until the conclusion of that arbitration. 9 U.S.C. § 16(b). This prohibition perhaps explains, but does not justify, why these petitioners decided to make their belated appearance in this appeal.

The mere fact that the district court relied upon the Third Circuit decision to dismiss their cases does not give the Neff petitioners a right now to seek certiorari from that decision. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *see also Karcher v. May*, 484 U.S. 72, 77 (1987); *United States ex rel. Louisiana v. Boarman*, 244 U.S. 397, 402 (1917); *In re Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) (per curiam). In *Marino*, for example, when a group of New York City police officers did not appeal from a judgment of the Southern District of New York and failed to move to intervene in an appeal to the Second Circuit brought by other officers, they were barred from appealing to the Supreme Court. "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." 484 U.S. at 304.

Perhaps to camouflage their sudden appearance in the appeal, the Petition repeatedly claims that the January 12 letter from Prudential's counsel to the Third Circuit was erroneous. (*See* Petition at 5-6, 13-14 and 16.) These assertions are in actuality nothing more than attempts to delineate supposed distinctions between the facts of the cases of the real parties before the Third Circuit and the facts of the Neff petitioners' cases. In particular, the Neff petitioners assert that even though Prudential was an NASD member when it moved to compel arbitration of Martin's and Weaver's claims, the company was no longer an NASD member at the time it moved to compel arbitration of their cases, and thus the Third Circuit erred in its ruling. But the Neff petitioners were not parties to the Third Circuit appeal, and thus Prudential's statements to the Third Circuit were completely accurate and any factual distinctions that may be drawn are completely irrelevant.[13]

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13. By hiding the fact that Prudential's letter only referred to the facts of the cases actually before the Third Circuit, the Petition misleads this Court (Cont'd)

For the same reason that the petitioners cannot raise *Farrand* and *Lai* in this Court, the Neff petitioners cannot ask this Court to adjudicate for the first time the impact of the change in Prudential's membership status on its ability to compel arbitration of their claims. In any event, even assuming that the merits could be considered for the first time on this appeal, Prudential's current NASD status does not alter the outcome of the Third Circuit's analysis. A determination of whether the parties intended to arbitrate their disputes necessarily depends upon their intentions and relationship at the time plaintiffs executed their Form U-4s. *See, e.g., O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804, 806-07 (9th Cir. 1982). Prudential was always the intended beneficiary of the plaintiffs' Form U-4s. "All the plaintiffs signed Form U-4 as a condition precedent to their employment at Prudential." (App. B at 8a, 133 F.3d at 228.) While the Form U-4s named Pruco as "my firm," it also named Prudential as a broker-dealer with which the petitioners would maintain concurrent registration.

(Cont'd)

about the veracity of the letter. What is worse, the Neff petitioners go on to make a series of factual misstatements to this Court about their own cases. They claim that the cases of petitioners Kroll, Carol Hales and Ybarra were filed "after Prudential terminated its association with the NASD." (Petition at 6.) In actuality, Kroll filed a complaint on March 14, 1996, and Carol Hales and Ybarra filed complaints on April 8, 1996; Prudential ceased to be an NASD member on May 22, 1996. The Neff petitioners claim that the motions to compel arbitration of the Kroll, Carol Hales and Ybarra were "not filed while Prudential was still a member of the NASD." (*Id.*) In fact, Prudential's motions to compel arbitration of those cases were filed on April 15, May 8 and May 13, 1996, respectively. The Petition claims that petitioners "Kroll, Carol Hales, Ybarra, Willenbring and/or Schulenberg should not be compelled to arbitrate because they signed U-4 applications after May of 1996." (Petition at 4.) The Petition neglects to mention that each had previously signed Form U-4 agreements prior to May 22, 1996.

As the district court found, the

> context of [the plaintiffs'] registration plus the language [providing for concurrent registration] make it clear that the representation concerning arbitration, paragraph 5 [of the U-4], applied to . . . Prudential.

(App. C at 35a, 924 F. Supp. at 635 (*quoting Prudential Ins. Co. of Am. v. Shammas*, 865 F. Supp. 429, 430 (W.D. Mich. 1993)).) Judge Wolin found this point dispositive (*see* App. C at 35a, 924 F. Supp. at 635), and his holding on the issue was never appealed. The district court's holding is also in accord with the other courts which have considered the question. *See, e.g., Riccard v. The Prudential Ins. Co. of Am.*, No. 97-1390-CIV-ORL-22A, slip op. at 4 (M.D. Fla. Apr. 9, 1998); *Essex Corp. v. Independent Fin. Mktg. Group, Inc.*, 1998 WL 78279, at *4 (S.D.N.Y. Feb. 23, 1998); *Foley v. Presbyterian Ministers' Fund*, 1992 WL 63269, at *2 (E.D. Pa. 1992); *Weinstein v. Equitable Life Assurance Soc'y of the U.S.*, 1996 WL 557321, at *2 (E.D. Pa. Sept. 26, 1996).

As an NASD member in 1995, Prudential appropriately exercised its rights as a Form U-4 beneficiary when it moved to compel arbitration. In light of the Third Circuit's ruling on the insurance exception, those arbitrations should now proceed.

CONCLUSION

For the foregoing reasons, defendant-respondent The Prudential Insurance Company of America respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

IN RE:

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; SALES PRACTICES LITIGATION; ALL AGENTS' ACTIONS,

MICHAEL R. WEAVER, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. When two parties enter into an agreement, does the agreement determine when issues or claims will be arbitrated or does a presumption in favor of arbitration overrule an agreement to exclude certain types of claims from arbitration?

II. When the Plaintiffs cannot recover on their claims without proving the alleged nature of a company's insurance practices, does the "insurance business" exception found in the National Association of Securities Dealers (NASD) Code of Arbitration Procedure preclude arbitration of the Plaintiffs' employment disputes?

LIST OF ALL PARTIES

Rick A. Martin, Plaintiff/Petitioner

Michael Weaver, Plaintiff/Petitioner

Eugene Kroll, Plaintiff/Petitioner; case filed April 10, 1996

Carol Hales, Plaintiff/Petitioner; case filed April 30, 1996

Anthony Ybarra, Plaintiff/Petitioner; case filed May 7, 1996

Lori Anderson, Plaintiff/Petitioner; case filed September 11, 1996

Rebeca Montero, Plaintiff/Petitioner; case filed September 11, 1996

Wilmer Sigwarth, Plaintiff/Petitioner; case filed September 11, 1996

Stephen Demaris, Plaintiff/Petitioner; case filed October 18, 1996

Theodore Willenbring, Plaintiff/Petitioner; case filed October 18, 1996

Darrell Dunn, Plaintiff/Petitioner; case filed October 30, 1996

Greg Knutson, Plaintiff/Petitioner; case filed October 30, 1996

Donald Hales, Plaintiff/Petitioner; case filed March 27, 1997

Earl Schulenburg, Plaintiff/Petitioner; case filed March 27, 1997

Anthony Bodway, Plaintiff/Petitioner; case filed January 30, 1998; and

G. Annette Nantz, Plaintiff/Petitioner;

The Prudential Insurance Company of America, Defendant/Respondent.

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FURTHER REASONS FOR GRANTING THE WRIT

I.

ANY AGENT WHOSE CASE WAS TRANSFERRED INTO MULTIDISTRICT LITIGATION MAY APPEAL ANY ADVERSE DECISION AFFECTING THE MULTIDISTRICT PROCEEDING.

All former Prudential agents involved in this litigation were drawn into multidistrict litigation. The objective is to provide centralized management of pretrial proceedings to assure the just, efficient and inexpensive determination of every action. *Matter of New York City Mut. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978), *In re Nat'l Student Mktg. Litig.*, 368 F. Supp. 1311, 1316 (J.P.M.L. 1973). Since all consolidated cases are treated the same, all parties in the multidistrict proceeding have standing to appeal an adverse decision.

The Neff petitioners' cases were transferred to the multidistrict court during the Third Circuit proceedings. Additional actions that come to the attention of the judicial panel on multidistrict litigation, even after consolidated proceedings have begun, are treated as "tag along" actions. *In re Preferential Drug Prod. Pricing Antitrust Litig.*, 429 F. Supp. 1027 (J.P.M.L. 1977). Judge Wolin stayed the tag along actions pending the Third Circuit's decision and dismissed **all** agent actions pursuant to the Third Circuit's decision. Even the Third Circuit case title refers to all agents: *In re the Prudential Ins. Co. of Am. Sales Practices Litigation **All Agent Actions***, 133 F.3d 225 (3d Cir. 1998) (emphasis added).

It was understood that all agents, including the Neff petitioners, were parties to the appeal and would be affected by the Third Circuit's decision. There was no need to intervene. Reconsideration of the dismissal orders would involve a review of the Third Circuit's decision. The District Court has no authority to

reconsider, alter or amend the Third Circuit's Order. All Petitioners, including the Neff petitioners, requested a rehearing or a rehearing *in banc* from the Third Circuit, which were denied. Seeking review of a different kind from the Third Circuit would have put the attorneys and the Petitioners at risk of sanctions. A petition for certiorari was the only appropriate action.

Judge Wolin appointed Neil Maune liaison counsel to represent **all agents** in all multidistrict proceedings. The case reporter specifically states "Neil J. Maune (Argued for **All** Appellees)." *In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions*, 133 F.3d at 227 (emphasis added). Thus, any adversely affected agent may appeal the decision.

Assuming, *arguendo*, that the Neff petitioners were not parties to the Third Circuit appeal, they are third party beneficiaries and parties in interest to the appeal. They are also aggrieved parties. An aggrieved party is "one whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment." Black's Law Dictionary, 6th Ed. The Neff petitioners' rights were directly and adversely affected by the Third Circuit's ruling and the dismissal of their cases. They are entitled to be heard on appeal.

Prudential claims third party beneficiary status since it benefits from all cases being dismissed. Yet, Prudential opposes anyone who was adversely affected also being third party beneficiaries with standing to appeal. Prudential seeks to reap the benefits of multidistrict litigation, without accepting any of the disadvantages.

Title 9 U.S.C. § 16(a)(3) permits an appeal from "a final decision with respect to an arbitration." *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991). The provision applies equally to decisions favoring litigation or favoring arbitration. *McDermott Int'l v. Underwriters at Lloyds*, 981 F.2d 744, 747 (5th Cir. 1993). The Third Circuit's order remanded all agent cases

for dismissal. An order compelling arbitration is a final and appealable order when made. *Francesco's B., Inc. v. Hotel and Restaurant Employees and Bartenders Union, Local 28*, 659 F.2d 1383, 1388 (9th Cir. 1981). The ninety day time in which to appeal the Third Circuit's decision was not suspended. Appeal after arbitration would have been untimely. Therefore, the Petition for Writ of *Certiorari* was the only applicable and appropriate option available to the Petitioners and should be granted.

II.

THE FILING DATES IN THE PETITION ARE THE CORRECT FEDERAL COURT FILING DATES FOR ALL PETITIONERS WHOSE CASES WERE ADVERSELY AFFECTED BY THE THIRD CIRCUIT'S DECISION.

In Minnesota state court, service of a summons and complaint commences a lawsuit. Minn. R. Civ. P. 3.01, 48 M.S.A. In Federal Court, a lawsuit is commenced by filing the complaint in federal court. Fed. R. Civ. P. 3. A plaintiff then has 120 days in which to serve the defendant(s). Fed. R. Civ. P. 4(m).

The instant petition was accurate contrary to Respondent's footnote number thirteen. Since the federal filing dates are the only dates of interest in federal court, the petition refers to the federal court filing dates. Prudential misleadingly uses the state court filing dates which do not apply in federal court. The Petitioners generally used only the federal filing dates to keep matters consistent throughout the multidistrict proceeding and to avoid unnecessary confusion.

Prudential's January 12, 1998, letter to the Third Circuit stated that it was a member of the NASD at the time each of the agents executed U-4s, at the time their employment with Prudential ended, and when Prudential moved to compel arbitration. However, Prudential terminated its association with the NASD on May 22,

1996. Petitioners Anderson, Montero, Sigwarth, Demarais, Willenbring, Dunn, Knutson, Donald Hales, Schulenburg and Bodway filed their complaints in federal court **after** Prudential was no longer an NASD member. Prudential disregarded its duty to reveal this information to the court. Since Prudential was no longer an NASD member, the NASD provisions do not apply. Prudential's January 12, 1998, letter tries to improperly narrow the issues by referring to only the parties Prudential chose to name on appeal.

III.

THE CASES RESPONDENT CITES TO ASSERT THERE IS NO CONFLICT AMONG THE COURTS ARE NOT ON POINT AND OFFER NO PRECEDENTIAL OR PERSUASIVE VALUE TO THE CASE AT BAR.

Prudential cites cases which purportedly hold that whistleblowing on illegal practices will not avoid arbitration. However, these cases are not binding on the Circuit courts or this Court. Further, the core issues in these cases are unrelated to the insurance aspect of the businesses.

> In *Trumbetta v. Metropolitan Life Ins. Co.*, No. 94-3275, 1994 WL 481152 (E.D. Pa. Sept. 1, 1994), . . . the dispute did not fall under the business exception because "although the plaintiff (a former insurance sales agent) [had] made some **general** allegations concerning the defendant's business practices . . . the **actual basis** for each of his claims [was] the conduct of his supervisors that led to his constructive discharge." Similarly, in *Prudential Ins. Co. v. Shammas*, 865 F. Supp. 429, 432 (W.D. Mich. 1993), . . . a former insurance sales agent's employment discrimination claims did not fall under the insurance business exception because the suit concerned the **conduct of**

> **other employees toward the plaintiff** and "had nothing to do with the insurance aspect of Prudential's business." *See also Foley v. Presbyterian Ministers' Fund*, No. 90-1053, 1992 WL 63269 (E.D. Pa. March 19, 1992) (holding that the language of the insurance business exception was not broad enough to cover **personnel** practices of insurance companies); *Wojcik v. Aetna Live Ins. and Annuity Co.*, 901 F. Supp. 1282, 1286-87 (N.D. Ill. 1995) (requiring that the plaintiff **allege unlawful insurance practices, not merely wrongful employment conduct** directed at plaintiff to invoke exception). *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 800 (10th Cir. 1995) (emphasis added).

The Petitioners have alleged unlawful insurance practices which successfully triggers the insurance business exception. *Wojcik*, 901 F. Supp. at 1292, *clarified by* 916 F. Supp. 729. Unlike the cases cited by Prudential, the instant allegations of illegal insurance practices form the **center** of the claims and should be excused from arbitration.

IV.

A PRESUMPTION IN FAVOR OF ARBITRATION SHOULD NOT OVERRULE THE PLAIN TERMS OF THE AGREEMENT WHICH EXCLUDE CERTAIN TYPES OF CLAIMS FROM ARBITRATION.

Federal policy does not favor arbitration; rather, federal policy is to ensure the enforceability, according to the terms, of private agreements to arbitrate. *Volt Info. Sciences, Inc. v. Stanford Jr. Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed 2d 488, 498 (1989). A court's "task in these cases . . . is to ascertain whether there exist 'exceptional' circumstances . . . that can suffice to justify the surrender" of jurisdiction. *Moses H. Cone Mem'l*

Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26, 103 S. Ct. 927, 942, 74 L. Ed. 2d 765, 786 (1983).

Courts are not to twist the language of a contract to achieve a result which requires arbitration. *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990).

> It is one thing to construe a contract to require the arbitration of a dispute. But it is quite another to rewrite a contract to require arbitration. A court simply cannot do that.

In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions, 133 F.3d at 236 (Greenberg, J. dissenting). To compel arbitration of the instant claims, requires a strained and twisted reading of the relevant provisions.

The Third Circuit held that it could not "say with certainty what is meant by 'intrinsically insurance' claims, and whether it embraces employment disputes." *Id.* at 234. However, whether an issue is an arbitrable one is a legal question for the court, and the power to determine arbitrability carries with it the power to define and limit arbitration. *Refinery Employees Union of the Lake Charles Area v. Continental Oil Co.*, 268 F.2d 447 (5th Cir. 1959), *certiorari denied* 361 U.S. 896, 80 S. Ct. 199, 4 L. Ed. 2d 152. Courts are bound to interpret contracts in accordance with the intentions of the parties — even if the effect limits arbitration. *Mastrobuono v. Shearson, Lehman, Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76, 84 (1995).

> Courts are perfectly capable of looking beyond the face of a complaint to determine whether or not the dispute really involved a defendant's insurance business.

In re: Prudential Ins. Co. of Am. Sales Practices Litig. 924 F. Supp. 627, 640 (D.N.J. 1996).

If the exception was intended to apply solely to "any dispute, claim or controversy" other than employment disputes, the 1993 amendment would have followed rather than preceded the "exception" phrase. *Young v. Prudential Ins. Co. of Am.*, 688 A.2d 1069, 1081 (N.J. Super. Ct. App. Div. 1997). The present claims "fall outside the insurance exception **only** if we conclude that **no** employee's claim can **ever** be subject to th[e] exception." *Id.* at 1082. (emphasis added). The NASD meant to exempt **any** dispute involving the insurance business of an insurance company member from compulsory arbitration, not just those involving specific classes of individuals. *Thomas James Assoc., Inc. v. Jameson*, 102 F.3d 60, 64 (2d Cir. 1996) (emphasis in original).

> [A] dispute implicating the legality of insurance practices surely is a dispute involving an employer's insurance business . . . [I]f the exception to the obligation to arbitrate employment controversies for disputes involving the insurance business is inapplicable here, it is difficult to understand when it ever would be applicable.

In re the Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions, at 236 (Greenberg, J. dissenting).

V.

THE PETITIONERS ARE NOT PRESENTING ANY NEW ISSUES ON APPEAL.

Ordinarily, this Court will consider only questions set forth in the petition for *certiorari*. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 646, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280, 288 (1992). Prudential claims the only issue before the Third Circuit was

> did the District Court err in holding that appellees did not have to arbitrate their pending employment-related claims because they fall within the 'insurance business' exception to the NASD Code of Arbitration Procedure?

Resp't Br. at p. 10. The reversal of that issue is what the Petitioners are appealing.

Assuming, *arguendo*, that the Petitioners were trying to raise new issues on appeal, this Court may consider issues waived below if the issues are so integral to the decision that they could be considered fairly subsumed by the questions presented. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37, 111 S. Ct. 1647, 1658, 114 L. Ed. 2d 26, 44 (1991) (Stevens, J. dissenting). Questions presented for review will "include every subsidiary question 'fairly presented therein.' " *Communist Party of the U.S. v. Subversive Activities Control Bd*, 254 F.2d 314, 321 (D.C. Cir. 1958).

The impact of Prudential's change in NASD membership status on its ability to compel arbitration is essential to the decision. The U-4 provisions apply only while Prudential remains an NASD member. In late May of 1996, Prudential did not reveal to the Neff Petitioners, nor apparently did it reveal to the District Court, that it had ended its NASD membership on May 22, 1996. A fully informed decision involves a consideration of Prudential's NASD membership status on its ability to compel arbitration.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Third Circuit's decision be reversed and the Petitioners be allowed to proceed with their cases in court.

Respectfully submitted,

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